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Power/Knowledge- Untying the knot

An examination of a penological method

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## Abbreviations

**BA** - Borstal Association

**BJC** - British Journal of Criminology

**CETS** - Church of England Temperance Society

**DP** - M.Foucault, *Discipline and Punish: The Birth of the Prison*, Penguin, 1979

**HLPR** - Howard League for Penal Reform

**NAPO** - National Association of Probation Officers

**PK** - M.Foucault, *Power/Knowledge*, Harvester Press, London, 1980

**POA** - Prison Officers Association

**PP** - Parliamentary Papers

**PRL** - Penal Reform League

**PRO HO** - Public Record Office Home Office

**RCPDCP** - Report of the Commissioners of Prisons and Directors of Convict Prisons

**RDMCP** - Report of the Directors of Convict Prisons

**RH** - Radzinowicz & Hood, *A History of English Criminal Law, Vol. 5: The Emergence of Penal Policy*, London, 1986

**SC** - Select Committee report

## Summary

This thesis examines an assumption that has recently permeated social theory, that power and knowledge constitute each other and are mutually reinforcing. Knowledge is an instrument to be used to realise the interests of some group, i.e. is subservient to agency. This assumption is oblivious to the rise of realist social theory which has argued that the facilitating frameworks of social life, structure and culture (which would typically include 'knowledge') must be construed as having a causal influence themselves, regardless of what people make of them or do despite them. These do not automatically satisfy groups' wishes and may hinder them.

The power/knowledge thesis has taken greatest hold in the study of prisons; it is argued that the penal reforms instituted in the 19<sup>th</sup> century were designed to control prisoners so that what seemed like a benevolent regime was actually an efficient mode of control. Thus the ideas that were used to direct the treatment of offenders were a means of power over prisoners. This thesis will incorporate historical material on the development of the prisons and show that supporting ideas of reform was not necessarily an exercise in power, so undercutting the principal thesis of the power/knowledge school.

I will draw on recent developments in social theory to show how the interplay between power and knowledge might be better conceived. I will argue that only by estimating the logical connection between ideas can we understand their proper role- how they may facilitate or frustrate action.

Thus I will query whether reform ever gained the prominence it did and show that it had always to be balanced by its logical counterpart, deterrence.



## Introduction

How should we interpret shifts in punishment? There have been two schools of thought on this topic. The first is the much caricatured liberal school, usually thought to be exemplified by Radzinowicz & Hood's work, *A History of English Criminal Law and its Administration from 1750*, vol. 5.<sup>1</sup> It conceives of the history of prisons as developing from a revulsion at the cruelty inflicted by previous forms of punishment and so the prisons were a beneficent shift away from excessive punishment toward a more just treatment of offenders.

The liberal school has two related weaknesses: a belief that people will automatically become repulsed by cruelty and will seek to reduce it; thus conscience is emphasised 'as the motor of institutional change'<sup>2</sup> or in a more sociological idiom, cultural values are the causal influence upon change. The problem is that not only are the roots of these values assumed to be natural but that this emphasis upon cultural values excludes reference to wider social factors such as economic or demographic changes, what would generally be classed as structural influence.

The revisionist histories arose as an attempt to remedy both of these defects: they examined the basis for prison reformers' beneficence, refusing to believe that people naturally become more altruistic. This led them to link up the reformers' beliefs and intentions with changes in the structure of society at the time of the prison's birth. The instability of the social order, brought about by industrialisation, had made the ruling classes anxious and previous modes of

punishment, such as capital punishment, were thought to be ineffective in maintaining order. Thus the prison developed not because it was less brutal form of punishment, but because it was seen as a more effective means of maintaining social order. There are disagreements between various revisionist histories as to how and when the prison actually operated as a form of subtle form of control, but the notion that the prison is primarily an instrument of control is shared by all of them- though this has been occasionally disputed. In some respects, the revisionist school throws the baby out with the bathwater: in its efforts to provide a basis for the cultural values of reformers, they explain them as being brought about a change a structural influences. Perhaps the simplest and most fundamental criticism one can make of this kind of history is the charge of 'over-schematising a complex story'.<sup>3</sup> As stated, several revisionists have acknowledged the weaknesses of their own accounts and Michael Ignatieff has stated that the

the real challenge is to find a model of historical explanation which accounts for institutional change without imputing conspiratorial rationality to a ruling class, without reducing institutional development to a formless *ad hoc* adjustment to contingent crisis, and without assuming a hyper-idealist, all-triumphant humanitarian crusade.<sup>4</sup>

This work is intended to be a sociological contribution to penology. Any sociological work must achieve a balance between three key variables, structure, culture and agency. Liberal history relied too much on cultural values, revisionism runs the danger of subsuming everything under structural developments and there is a version of history which sees the past as simply one damned event after another; this last kind of history extracts agency from its conditions of actions and



sees history as a continual ‘*ad hoc* adjustment’ to various events. Neither structure nor culture make much of an appearance. This dissertation utilises developments in social theory, notably a movement known as realism, to try and show how a balance might be achieved the three variables. Realism argues that structure and culture should be conceived as pre-existing any act of agency and hence autonomous from it. Because they are autonomous, cultural and structural frameworks will possess properties which will influence agency. It is the effects of the cultural frameworks that this study is dedicated to uncovering.

Since it has been the role of ideas and values that have been so contentious in penal history, it is these cultural influences that will be the primary focus of this study. It has become commonplace to assert that many of the individualised programs of treatment that were ostensibly developed to aid the prisoner were actually a way of controlling his behaviour, a process of normalisation. This has been termed the power/knowledge complex, a self-reinforcing process whereby power and knowledge mutually constitute each other. This was developed by Michel Foucault in his work *Discipline and Punish* who traced the emerging power/knowledge complex in the development of the prison at the turn of the 19th century. This thesis has been revised by David Garland who argues that the development of the reforms necessary to exert a more subtle means of control could only have been developed at the beginning of the 20th century, with the inception of the discipline of criminology. Garland is explicit about using the power/knowledge formula, ‘utilising a conception of knowledge which always sees it in relation to power’.<sup>5</sup>



Historians have often been sceptical about the extent to which new modes of treatment gained a foothold in the British penal system. W.J. Forsythe is insistent that 'the local and convict prisons clung tenaciously to the concepts of measured punishment, moral culpability, limited deterrence and uniformly administered discipline' and the prison authorities 'were distrustful of any eugenic or other theorising which might lead to abandonment of *mens rea* at the heart of criminal jurisprudence'.<sup>6</sup> While a historian like Forsythe is able to document the various omissions which, if included, would undermine the plausibility of the revisionist thesis, he is unable to provide a compelling reason why there are such lacunae. I will argue that these omissions are a result of the selective perception of the power/knowledge formula encourages; it occludes events that militate against the view that knowledge leads to power and that while this formula is maintained we will never arrive at a satisfactory understanding of how the prisons developed. It is the assumptions embodied within the power/knowledge formula that I will be criticising rather than the writings of any one author.

In Chapter 1 I will briefly set out the basic points of the revisionist penal history and then critically examine it, incorporating some of the revisionists' own criticisms of the project. I will indicate how the power/knowledge formula is unable to include fundamental issues which must be part of any social history. Having hopefully convinced my readers of the deficiencies of the power/knowledge approach, I will set out to show in Chapter 2 how I believe the connections of power and knowledge should be broached and

point out how this approach differs from that adopted by Foucault and his followers.

I will then apply the theory I have developed to British penal history, to show how it can be expounded in a fuller fashion than a Foucauldian narrative and to substantiate the theoretical points that I make in Chapter 2. I will cover the period extending from the establishment of the first national prisons and the burgeoning efforts of the government to secure changes in the local prisons. This dates from approximately 1815 and it will be my concern to show that from the outset penal administrators were plagued by the problem of reconciling reform and deterrence. This problem will be the main focus of the historical chapters for two reasons:

(i) Just as a liberal view of history would ignore the continual clamour for policies of deterrence that disregarded any concern for the individual prisoner, so too does the Foucauldian account, though it puts a different interpretation on reform. If I can convincingly show that prison policy was always animated by both reform and deterrence, this should quell notions of prisons being increasingly oriented to the one without reference to the other; it should also put to rest one of the central tenets of the revisionist case, namely that of prisons being increasingly animated by reform, and call into question the revisionists' whole approach to writing penal history.

(ii) If I am able to demonstrate the indispensability of both reform and deterrence for penal policies then the scenario of knowledge that arises from considering both of them should lead one to reassess the usefulness of the power/knowledge formula. It is by the endorsement of this formula that

revisionist historians have been unable to acknowledge the persistence of policies of both reform and deterrence and if I can make a good case for this persistence, a method needs to be found that will allow us to make good this major omission of the revisionist school.

This will be the point of my excursion into cultural analysis in Chapter 2 for it allows me to fashion the tools necessary to unpick the complex problems of penal history. Having outlined the method I will use, I will then show how the problem of both reform and deterrence can be incorporated within a penal history, so that my thesis has both a positive and negative agenda: negative because it aims to show up the limitations of the revisionist school of penology and positive because it tries to show how such limitations can be overcome.

As stated I will begin from 1815 and continue up to 1921. I will divide the historical thesis into three parts with the focus throughout being on the problem of reconciling reform and deterrence.

(i) 1815-65, a period when reform predominated

(ii) 1865-95, a period when deterrence predominated

(iii) 1895-1921, a period when a synthesis between the two was attempted

Such a wide time-span permits me to make the case for the continual persistence of both reform and deterrence and thus show how the revisionist school gives a skewed picture of the development of both prisons and ideas of punishment. I will explain how either reform or deterrence was able to predominate at the expense of the other in Chapters 3 & 4 and the reasons behind the subsequent search for a synthesis between the two. Since



Garland has made so much of criminology's impact I will examine its basis and development in Chapter 5. In Chapter 6 I will show how the attempted synthesis between reform and deterrence fared and why it did not succeed; I will also assess the impact of criminology upon penal practice and suggest why it might not have had as great an impact as has been thought. The historical analysis ends where it does for 1921 represents a date at which David Garland believes reformatory efforts to have triumphed but others dispute this so it is a useful watermark by which we can test the revisionist case.

This thesis is not meant to be primarily a work of history as the emergence of prisons has been covered exhaustively elsewhere. It will be concerned to demonstrate how the influence of ideas affected the actions of agents in the context of penal affairs and to demonstrate that vital parts of history are omitted by the use of the power/knowledge formula. Since I am presenting this as a marker toward the proper place of ideas and knowledge in history it would be as gross a misrepresentation as the power/knowledge formula if I suggest that the development of penal punishment and the prisons was solely due to intellectual turmoil. The power/knowledge school tries to overthrow the picture of reform as the beneficent application of ideas of reform by always tying such ideas to the vital interests and machinations of various groups. I will show in Chapter 7 how this approach actually excludes factors that could usually be classified as structural and try to show how they can be included alongside the cultural explanation that I introduce earlier. It is a pivotal assumption of this study that

structure and culture are relatively autonomous of each other, so that it is their interplay over time which needs examining; any approach which subordinates either one of them or compresses both together is unable to do this.

What this work does not do is provide a general theory with which one can interpret the development of the prisons. Realist social theory works from the local up; once it is admitted that cultural and structural frameworks are autonomous of agency, they cannot be treated as putty in the hands of agents. They may obstruct or facilitate certain courses of action but they will certainly have an affect. Hence any general theory must take them into consideration, for their influence will demonstrate the validity, or otherwise, of any theory. Thus, this work should be considered as providing a yardstick by which any general theory can assess itself and not itself establishing a general theory.

## 1. Revisionist Penology: A critique

In this chapter I will develop a criticism of the methodology developed by revisionist historians of the prison which is responsible for many questionable assumptions and lacunae in their work. I will restrict my criticisms to the role of ideas and knowledge in penal history and to matters arising thereof. Many of the points I will make have been made by others, including self-confessed revisionists. I will draw these together and show how they are connected to assumptions about the role of knowledge and power.

### 1.1 Reform as effective control

Foucault begins *Discipline and Punish* with a description of a terrible punishment being wreaked upon an assassin in France by the state authorities and suggests that this was emblematic of the punishment that was carried out as it consisted of punishment of the body and infliction of pain. He believes that there was a shift away from such punishment in the 19th century toward punishment which seemed on the face of it more constructive since it attempted to train the individual to lead a law-abiding life, to correct him. Hence the usual connotation of the reforms within prisons as a sign of progress which Foucault actually disputes, because he believes they were a more effective means of control; crowds no longer cheered the sight of offenders being cruelly dismembered but displayed sympathy for their plight so that grisly executions were becoming less and



less effective in upholding the law, for the punishments seemed incommensurate with the crime. For Foucault

‘the reform of criminal law must be read as a strategy for the rearrangement of the power to punish, according to modalities that render more regular, more effective, more constant and more detailed in its effects; in short which increase its effects while diminishing its economic and political cost’.<sup>1</sup>

Thus the prison was born for it meted out ostensibly less severe and more humane treatment to offenders and moulded its inmates in a certain manner, hence its regime, and power generally for Foucault, cannot be construed in a wholly negative way. Punishment is no longer construed in a wholly negative way because it is no longer primarily concerned to exact retribution for the crime committed but to train the individual so that he will no longer commit crimes, to ‘normalise’ them. This involves

a means of assessing the individual in relation to a desired standard of conduct: a means of knowing how the individual performs, watching his movements, assessing his behaviour, and measuring it against the rule. Surveillance arrangements and examination procedures provide this knowledge, allowing incidents of non-conformity or departures from set standards to be recognised and dealt with, at the same time ‘individualising’ the different subjects who fall under this gaze. And since the object is to correct rather than punish, the actual sanctions used tend to involve exercises and training, measures which in themselves help

bring conduct 'into line' and help make individuals more self-controlled.<sup>2</sup>

The successful exercise of discipline depends upon a body of knowledge being developed which provides information on those who are the objects of this discipline. Hence the development of knowledge is intrinsically connected to the exercise of power.

It is the prison which creates the delinquents and in two ways, as Garland points out. Firstly, by virtue of the new discipline of criminology there exists an individual known as a 'criminal' distinct from the ordinary populace and secondly, because the prison exists to perpetuate a criminal class whose transgressions of the law are repeated because they have little option. It is Foucault's claim that the prison has succeeded where it seems to have perpetrated its greatest failure: namely its inability to deter persistent offenders. Instead the prison has managed to produce a 'closed milieu of delinquency, thoroughly structured by the police' which has 'turned out to be useful, in the economic domain as well as the political'.<sup>3</sup> How this supervision was accomplished is hastily adverted to: 'by locating individuals, infiltrating the group, organising mutual informing',<sup>4</sup> techniques which were far more difficult to carry through in practice than is assumed. Foucault may well have been forced into this untenable position by his own ambiguity concerning the putative function of the prison. On the one hand, he wishes to argue that once a person is received within the prison walls he is subjected to a range of 'disciplinary techniques' all designed to mould the inmates in a particular way; at other times he seems to believe that 'prison



labour aimed to teach them nothing'<sup>5</sup> which, if this was not always the aspiration, was very often the outcome. However, even after admitting this failure he still wants to maintain that released prisoners (and by implication the prison) still serve some function, that of constituting a close-knit band who serve as 'an agent for the illegality of dominant groups'.<sup>6</sup> Foucault seems to assume that by labelling an activity illegal, this makes it more amenable to supervision and control and potential profit, a contestable claim at the very least. Even presuming this to be true why does the prison have to subject them to all the disciplinary techniques within the prison if they are not expected to live law-abiding lives but will be always under the scrutiny of the police?

'This surveillance has been able to function only in conjunction with the prison.... Prison and police form a twin mechanism; together they assure in the whole field of illegalities the differentiation, isolation and use of delinquency. In the illegalities, the police prison system segments a manipulable delinquency'.

These three groups form a triangle which 'support one another and form a triangle that is never interrupted. Police surveillance provides the prison with offenders, which the prison transforms into delinquents, the targets and auxiliaries of police supervision, which regularly send them back a certain number of them to prison'.<sup>7</sup> Even assuming that prison service and police were in such close agreement<sup>8</sup>, the metaphor of the electrical circuit fails to provide illumination simply because the notion of prisoners being moulded within prisons and then to be sent out into the community with a

percentage of them being picked up again as the authorities saw fit has no basis in historical fact. The period from 1865-95 in English prisons was one in which little attention was paid to educating the prisoners yet some of a Foucauldian bent might assume from the fact that an increasing number of offenders were recidivists that the authorities were happy to see crime confined to a small band of criminals. But this failure to halt recidivism was precisely why a degree of specialisation was being introduced into a tight-knit system to deal with precisely this problem and why the ideas governing penal practice were transformed.

More recently, the Foucauldian thesis has been modified somewhat in Garland's *Punishment and Welfare* wherein he argues that chronologically, Foucault's thesis goes awry because the kind of knowledge necessary for individualised treatment only developed at the beginning of the 20th century, not the 19th. Garland still retains its essential idea, that reform is a method better suited to controlling its recipients and so is a more subtle means of control than deterrence. The onset of mass democracy had made it necessary that people not be treated so harshly in prisons yet still abide by the accepted norms of society. Criminology helped in making this switch in the modalities of punishment as it now identified the offender as a deviant who would be

'subjected to a work of normalisation, correction or segregation which ensures one of two things. Either they become responsible, conforming subjects, whose regularity, political stability and industrious performance deems them capable of entering into

institutions of representative democracy; or they are supervised and segregated from the normal social realm in a manner that minimises (and individualises) any damage they can do'.

Garland is clearer than Foucault as to the reasons why modes of punishment were transformed: it was necessary to inculcate within the prisoners the norms that were essential to the maintenance of existing interests in a different political climate, that of mass democracy and the working-class vote; 'the sweep of the franchise and the social realm is indeed widened, but at the same time the conditions for participation in social life are made more rigorous, more contingent upon behaviour and character'.<sup>9</sup>

Why should the authorities be interested in reform if not for the obvious reason of enabling offenders to live better and more honest lives (the traditional liberal assumption), apart from some inexplicable desire to control? The answer is that it was necessary to maintain the hegemonic domination of the bourgeoisie (whose constituents are left unspecified). Why was such domination proving so tenuous? The onset of the mass vote opened up the prospect that traditional class domination would be displaced and also meant that penal punishments could no longer be so harsh in their treatment of criminals, the great mass of whom were composed of the working class, since they now had a voice in the political process.

In the new democracy, where citizenship and security extended to all classes, discipline could no longer function through repression and exclusion. Henceforth its modalities would have to be more refined and discreet. Yet at the same time they would require to



be more systematic and penetrating, more thorough in their effects. Their task was to ensure that the new and permanent threat posed to the system of class domination by the workers' vote, their mass trade unions and their collective political existence was counterbalanced by an equally extensive and thoroughgoing regulation and discipline, reducing the 'risks' that democracy entailed, ensuring that the new citizens were good citizens.<sup>10</sup>

The penal authorities were now being required to police the working class to ensure that they continued to fit the requirements that were necessary to continue the system of class domination. The administration of justice was no longer the blunt instrument of the past, consigning criminals to a period in prison intended to instil in them a fear of the consequences of law-breaking which would deter them from infringing the law again. The problem with this system was that it was 'either too harsh - spiralling individuals downwards into the criminal class - or else ineffective, leaving those ineligible for prison completely beyond control [the inebriates, feeble-minded et al.]'.<sup>11</sup> This novel system of punishment would be more discreet but also more effective since it would not disturb the sensibilities of the newly enfranchised. As was constantly reiterated, punishment, from the handing down of sentences to the dispensation of probation, would no longer focus on the offence but on the individual offender all under the guise of seeking the most suitable punishment for the particular offender. Criminal justice would have available to itself 'new supplies of knowledge

implying a new scope for power. For the new system of normalisation, with its capacity to prise open and enter into the intimate details of the individual's life, allows a measure of penetration and subtlety, which was altogether new to the forces of the criminal law'.<sup>12</sup>

It should not be supposed that purely punitive punishments applied without consideration of the offender's circumstances were discarded; beyond the normalising sector of punishment (probation, after-care and licensed supervision) and the correctional sector (including all those institutions such as the Borstals and various reformatories which tried to inculcate a disposition that would not prove disruptive when released) lay the segregative sector in which were housed all those who had 'refused to submit or [had] been unable to submit to the disciplines of the dominant social order'.<sup>13</sup> The foremost institution was the prison into which were cast those whose probability of reform was low and whose offence was serious enough to warrant time in prison. The prison was a place of last resort, functioning as a back-up mechanism after people had passed through the first two sectors without effect, or simply by-passed them.

Garland not only tries to provide a more convincing historical account than Foucault, he also tries to provide a more convincing explanation for the weight that was lent toward programs of reform. His work is not only Foucauldian in its inspiration but also in its methodological approach: it always views ideas as being tied to power and the elaboration of these ideas as contributing to the successful exercise of power. Thus the development of criminology is crucial for it provides both the catalyst and rationale for novel methods of

punishment; an obvious question is what happens to the previous conception of punishment, as according to the principles of classical justice which insisted on equal punishment for all offences of a kindred nature and punishments which would 'fit' the crime, the working out of this proportion being a matter for judges and legislators. Criminologically-inspired policies could not be incorporated into the criminal law without attention being paid to how this would affect previous notions of punishment.

It is not surprising that one reviewer of Garland's book wrote of the neglect of the 'force of the rule of law [a previously existing cultural framework] and the constraints it imposes'. He goes on to note that

'the root principles of the rule of law are legality and due process.

Restraints are placed on the definition of conduct as criminal and upon the methods available to law enforcement officers. Granting arbitrary powers *contradicts* [my italics] the rule of law as does the absence of equality before the law.<sup>14</sup>

To overcome this objection, Garland would had to have shown how this contradiction was resolved. He realises that 'no one single program completely succeeded in imposing itself on the world of practice',<sup>15</sup> that there were various forces of resistance which operated to prevent the wholesale adoption of any one program. Moreover among the various programs which it was proposed would be implemented there existed several contradictions such as the ideas of criminality advocated by eugenicists and environmentalists. However there were various forces which supported the continuation of punishment along classical lines so that the Government



would not lay itself open 'to charges of showing favour to or prejudice against particular prisoners'.<sup>16</sup> There always existed a strong current of distaste against the proposals of the eugenics movement which smacked too much of autocracy. We should not make the mistake of collapsing the ideas governing practices with the beliefs supporting them; we can imagine a scenario in which many people lose faith in the legitimacy and efficacy of these ideas but if there is nothing to be put in its place, the practices continue as before.

Garland argues that the rise and fall of the prominence of certain ideas can never be understood apart from the push and pull of politics so that a 'sound theoretical basis and the promise of effective penal or social intervention were never enough to ensure the success of new proposals. They also had to be representable [*his italics*] in political and ideological terms'.<sup>17</sup> I hope it is clear that Garland is saying that saying that the new programs had to be convincing on psychological terms, not logical grounds. If they could be fitted in with the prevailing prejudices of the day, then the battle was won and these new programs would prevail. Thus this process will involve 'arbitrary assumptions, non sequiturs and logical contradictions', all of which are produced not by the search for 'truth' (in a non-ideological sense) but by a political process through which is established a new 'regime of truth'.<sup>18</sup> Yet if such a regime rests on a logical incompatibility it is unlikely to be stable.

Pragmatic eclecticism was the order of the day with paltry reverence being paid to the dictates of logic, so much so that 'theoretical difference and

conceptual discrepancy were made to disappear if divergent positions could be satisfied by a common recommendation or policy objective'.<sup>19</sup> How precisely these differences are effaced is never made clear, but if a patch is put over a logical hole surely someone astute enough to see the logical deficiencies can pull on the thread and reveal that the emperor actually does not possess any finery worthy of the name. Moreover those who are applying the patch surely recognise that it is a temporary expedient which is designed to divert attention from the problem and not address it.

This refusal to admit that logical incoherence can cause problems in implementing logically slipshod policies ensures that Garland's approach is curiously bloodless but triumphalist. He admits that the policies developed contained glaring logical faults but somehow they emerged as the dominant ideas directing policies. There is little indication of how these policies fared beyond the legislative stage, with scant reference being made to the reluctance of the courts to endorse disproportionate punishment for offenders or the reluctance of various groups such as the Church of England Temperance Society or the local aid societies (whose compliance he overestimates; see p.210-14) to go along with any innovations. There is no indication of the reluctance of the magistrates to convert their courts into settings that would be more akin to tribunals of social welfare that were meant to unearth the social conditions which may have been influential in provoking the offence in question. The reformers wished to curtail, in the case of children, notions of criminal responsibility and consequent punishment but the magistrates were unwilling to countenance such changes for fear that



the law would then be too lenient toward children. Although the civil functions of the court were enlarged, the underlying legal principles were retained so that nothing was done 'to resolve the dilemma of conflicting principles which had always afflicted the jurisdiction [of the juvenile court]'.<sup>20</sup> There is little sense in his work of the fierce disputes that were enacted about relaxing the scope of the classical justice model.

Pragmatism is all very well but perhaps some people abide by a sterner criterion of truth. It is suggested that the compromise effected between classical justice and criminology was one whereby the responsibility of the individual 'became a presumption which was always put in doubt'.<sup>21</sup> What would it have taken for this presumption to have been discounted? It is too strong to say that those who handed down sentences always presumed that various factors, other than the individual's intention, were decisive in producing the offence; would it not be more accurate to say that the burden of proving that various factors, irreducible to the individual will, were decisive in producing the act in question, was placed on the shoulders of the proponents of the new science of criminology? Perhaps the Foucauldian inspired theorists would be happy to go along with this suggestion for

if one were crudely to summarise the conduct of the criminology programme, it could be said that it began by promising to demarcate and identify the criminal by means of objective, specifiable criteria. Having convinced its audience of this possibility, it then withdrew the offer of a publicly specified line of demarcation and instead arrogated to itself the task of

demarcating. Moreover this regrouped strategy has advantages which extend beyond the promotion of the criminological expert: for in its new forms, it specifies not a norm, but an apparatus to enforce norms. It does not so much specify the criminal 'Other' as indicate his existence and set up an apparatus qualified to identify and police 'him'. Thus, to extend Foucault's arguments, it justifies an extended form of policing by naming an 'Other' who can never be known in advance of a generalised, but closely drawn practice of observation which covers the whole population.<sup>22</sup>

The respective expert profession, having gained the trust of the public in their ability to successfully identify criminals, then renege on this promise but continue to enjoy public faith in that ability. But why should the public be convinced if there is no reliable proof forthcoming that the 'experts' can actually carry out the task of identification; we can ask not only why should people be so suppliant before these so-called experts but how did they gain such a prestigious tag in the first place? What is the basis of their expertise? Criminology was an inchoate discipline and did not possess a tradition of past successes so that people would have been inclined to give it the benefit of the doubt. It would surely have been required to proceed by inductive research, issuing predictions that could be verified or falsified, but there is no evidence, in Garland, of any such criterion existing. All it needs for a science to be accepted is rhetorical promise. It is difficult to find any evidence that criminology had managed to insinuate itself into such a prestigious position that people automatically deferred to it



especially since its acceptance would have meant an upheaval in penal practice. Not needing to state the basis of their identification of criminals leaves the criminological programme in the advantageous position of not having to possess any coherent program at all, just the desire to police the whole population. Criminal justice was left in the curious position of being animated by ideas which failed to coalesce into any recognisable doctrine which anybody could identify but which still provided the basis of punishment for vast sections of suspects. Garland does not seem to believe that logical inadequacy or incompatibility have a part to play but conceives the linchpin of ideas as pertaining to psychology which leaves the elaboration of ideas simply a matter of desire and conviction on the part of the people involved, so that he can say that 'versions of criminology, social work and eugenics' enter into penal practice retaining their 'practical advantages, if not their theoretical integrity'.<sup>23</sup> But how can the dispassionate reader estimate if they have retained their practical efficacy if we are left unsure as to the criteria by which they have been accepted?

Criminology began by making bold statements which did jolt people out of a complacency concerning the causality of criminal deeds but did not gain mass acceptance precisely because its diagnoses were unsubstantiated. The logical connection between the idea of a responsible human action, such as a criminal deed, and the idea that there could be others factors, other than the human will, which were influential in producing the deed was not one of necessity. It was not immediately suggested by the idea of a human act, conceived as it was at the time, but neither was it logically opposed to

it. It was then a question of trying to find a method by which the potentially huge host of factors could be limited, one example being the study by Goring, who specified that criminality was largely a matter of heredity. These results, in turn, were assailed for not paying due attention to social and environmental factors so that we can see that the development of criminology produced increasing specialisation as more and more effort is devoted to discovering just how influential a particular factor is and not a consensus of views. As Rose comments on the continuing development of criminology, 'an historical perspective demonstrates an increasing tendency toward particularism, toward the study of specific problems of importance as against the large exploratory study'.<sup>24</sup>

Garland has come to admit that

'the most obvious limitation of *Punishment and Welfare* as a *historical* account, is its tendency to view penal change only from the point of view of its implications for class domination and control of the poor. In doing so, it replaces the analysis of *cultural* forces by an analysis of *ideological* forces.'<sup>25</sup>

What this implies is that we should stop seeing punishment about more efficient control and instead try to understand the other considerations that lie behind punishment. This is not just a call to attend to the popular sentiments behind punishment but also the cultural frameworks that underpin these sentiments.

## 1.2 The Links between Power and Knowledge

I have briefly reviewed the thrust of the revisionist theories and made some isolated criticisms; I now wish to draw them together and demonstrate how most of them are connected to the endorsement of the power/knowledge formula.

There often seems to be an unstated assumption within social theory that while social structures can have an influence, irrespective of agents' desires, ideas and beliefs are far more malleable and do not constrain in the way that social structures do. It should be an empirical question whether there can exist such influences but it should be noted that the Foucauldian approach would discount them immediately, indeed it would have to or otherwise their whole approach would be invalidated, premised as it is on knowledge standing in a complementary relationship to power. The suspicion then arises that there may be an element of concealment within such narratives, not perhaps intentionally, but as a result of the method adopted which will only admit a certain type of ideational influence and denies or skims over all others and which results in a very peculiar account of the development of knowledge and culture. Despite repeated avowals that the power/knowledge formulation was designed to facilitate a greater understanding of the relationship between these very elements, it actually radically simplifies their relationship and proves unable to provide a narrative which adequately captures the full complexity of the relationship between cultural factors and the social agents on which they impinge.



On what grounds am I faulting the power/knowledge formula? What are the consequences of compacting power and knowledge together so tightly that they are always seen as necessarily linked? The first objection is that by postulating an immediate relationship of knowledge to power, Foucault relies too much on the notion of power and so uses it where it is inapplicable. Knowledge can be used as a resource in a struggle between various groups but to attempt to attribute power solely on the basis of the possession of resources runs the danger of confusing a distributive conception of power (power to: the capacity of individuals or groups to realise their intentions) with a relational notion of power (power over: the capacity of individuals or groups to realise their will despite the resistance of others) which is a social relation in which some people or groups exercise power over others. If power be construed as 'power to' this means that it is a generalised capacity to bring about intended outcomes which the utilisation of resources makes possible. However, as this is not a social relation we can read off from the resources the likelihood of the outcome, so that by looking at the finances of the government we can say that it will be able to build better housing because there will be no human resistance. But if the outcome is contested (power over) there is no guarantee from studying one set of resources in isolation from another set which it will be used against that it will procure success. We could not have ascertained with much likelihood if the U.S. was going to win the arms race in the 1950s simply by examining their then defence budget for once it entered into competition with the USSR the nature of this interaction determined future outcomes. Success depends on

the strength of one party vis-à-vis another and so cannot be determined apart from interaction itself. If we then accept that power is a relational concept then we should be wary of attributing it by examining one set of resources alone. What all this entails is that we first look at the resources that the respective parties and groups can bring to the negotiating table and attempt to estimate their probability of success from a direct comparison. Thus we must compare the relative strength and coherence of a group's policies to gather who is the more powerful.

Many commentators have interpreted Foucault's power/knowledge formula as arguing that a successful exercise of power is dependent on knowledge about whoever is the 'intended' target, or as Garland puts it

the successful control of an object - whether it is an object in nature or a human object - requires a degree of understanding of its forces, its reactions, its strengths and weaknesses, its possibilities for change. Consequently the more it is known, the more controllable it becomes. For Foucault the relationship between knowledge and power is thus an intimate and internal relationship in which each implies and increases the other, and his use of the term 'power-knowledge' is a kind of conceptual shorthand used to emphasise these interconnections.<sup>26</sup>

Why should we refer to a human agent as a human object? To do so is to prejudge the success of any venture by one agent against the resistance of another and to rob agency of one of its most fundamental characteristics, that of autonomy. It is to believe that those who are undergoing an attempt



at control can have no recourse to any initiative or resource that will help to stave off an outcome that would be unfavourable to them. Not only does it strip agency of one of its most fundamental powers, it also reveals something striking about the conceptualisation of the field of knowledge.

To state, prior to interaction, that the implementation of a body of knowledge will be successful is to conceive it, the program or policy as knowledge, as possessing a great degree of comprehensives and coherence, such that it is intrinsically superior to any potential rival programs. The objections which can be placed against it are minor so people simply have to knuckle down and accept it. Surely this scenario seldom pertains in the field of intellectual progress, as often what looks like a promising development may, in the light of objections, turn out to be sorely lacking. Any proposed link between power and knowledge would confuse what is a rare example in intellectual history with general progress. Such is the case with the early development of criminology: to say that the development of criminology induced power ignores both how varied criminology was and how it was plainly incompatible with the principles of classical justice, so that objections could be raised against it from this perspective. This is why I object to those who have tried to amend Foucault's revisionist history by suggesting that his notion of assujetissement (subjectification probably being the closest translation) could only be possible with the development of criminology with its close attention to the factors which may have contributed to the individual committing crime. The inchoate and uncertain state of this new science made it unlikely that it could ever gain such dominance so quickly



that it could be said to be the intellectual bedrock of all penal programs. The ideas of criminology permeated into public debate in Britain through the dissatisfaction of marginals who went looking for ideas that would serve their interests better than those that were currently established. The social fact that it is those who were on the margins of influence and power makes it likely that those in power would have most to lose from accepting the proposed innovations so that they would try to resist any attempts to gain a sympathetic audience for these ideas.

Having questioned whether there is such a perennial link between power and knowledge, I now wish to turn to what the formula implies for knowledge itself. By stating that a field of knowledge constitutes power relations,<sup>27</sup> he suggests that knowledge is somehow born as a seamless whole, requiring no handiwork at all before it can be used. This points to one of the most unsatisfactory aspects of Foucault's genealogy of ideas in that it paints intellectual history as a series of abrupt swings, as one set of ideas proves to be unsatisfactory another instantly rises to take its place with little explanation as to how this alternative program was constructed. The possible Foucauldian retort that it was less a matter of theoretical than of practical logic, i.e. people desired it so that it appeared is hardly convincing and does little to answer the query.

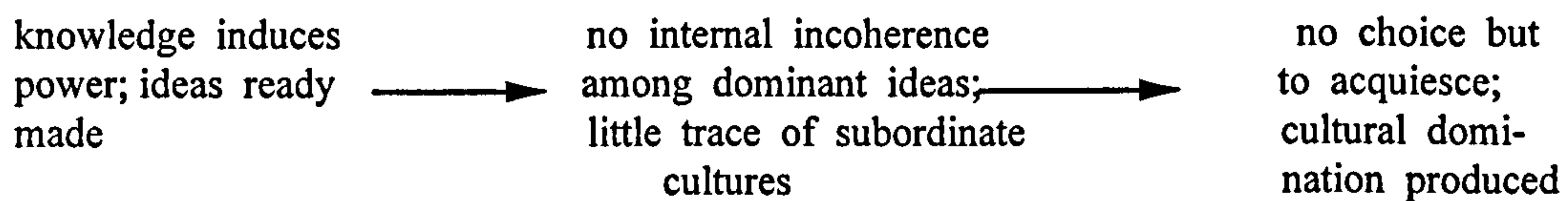
What is missing from the Foucauldian account is how the ideas that are put in place in social life in the form of policies, doctrines, regulations actually come about. We get no indication how such theoretical projects are constructed and how the elements and accidents of social life may

influence their development, 'how practices or discourses are articulated to form complex wholes'.<sup>28</sup> Even the most favourable intellectual scenario that I will present, that of a comprehensive and coherent program, must be patiently worked at as linkages are built up between various ideas and some degree of systematisation between the parts is attained. But while this is being achieved various factors may influence it so that ideas which seem propitious are never actually realised. This is why I favour a broader definition of knowledge than Foucault, because it allows one to see how the institutional modes of treatment actually arise and are implemented.

The failure to allow an adequate temporal element in a history of ideas, during which people develop these ideas further, leads to another strange failing in Foucault's account, namely the unimportance of people. It has often been remarked that it is difficult to tell with Foucault from whom the various tactics and strategies spring and those on whom the consequent machinations work are strangely acquiescent. It should be no surprise that if power and knowledge are instantaneously linked at the outset, then we have a scenario of the most favourable ideational relationship where a web of closely linked ideas presents no chinks that can be exploited. Since it has already been developed to the hilt and presents no opportunity for criticism, there is nothing to do but implement it or subordinate oneself to it, depending on one's social position. Hence the relative unimportance of social actors, despite all the vaunted talk of doing away with idealism, since there is nothing they can do in the way of constructing or obstructing the elaboration of these ideas. It is important to note that not only is it those

on the receiving end of these ideas who have little influence or effect but also those who implement these ideas. They are reduced to bearers of these ideas since they do not question, criticise or amend them but simply put them in place.

Figure 1



So we must reject the instantaneous identification of knowledge and power, since instead of offering people a foot in the door which leads to cultural change it abruptly slams it shut on them. It presents us with a series of abrupt swings as some policies are replaced in favour of others. Instead of this scenario we must be attentive to how ideas and policies are patiently worked at and problems attended to and resolved.

As stated, the power/knowledge formulation can postulate only one particular kind of relationship between power and knowledge whereby immediate and obvious benefits proceed from the combination of certain items of knowledge and people are induced to investigate and elaborate possible linkages between them. Such was the relationship between punishment and justice so that punishment could be legitimate only if it was equitable, i.e. tied to the idea of justice and did not suffer wide variations in practice which were perpetrated by various judges. Great play was made of this connection by members of non-conformist religions in the



late 18th century as they protested over the inequity of punishment and the link was pursued throughout the 19th century by people such as Bentham and prison administrators. This was a powerful weapon for their opponents could not come up with a convincing rebuttal and had to accept the validity of the argument. Even though the judges resisted the logical outcome of overcoming such anomalies and disparities in sentencing, the development of codified law, they were still intermittently forced to initiate efforts of their own to reduce the alleged disparities. For those who had assumed responsibility for prisons nationally, this linkage proved to be one of the most powerful arguments for pressing the case for uniformity. Here we have a clear case where the conjunction of ideas does prove to be a boon and worked in favour of the national penal administrators but equally proved to be a hindrance for others. What is important to note is how long it took to establish this link which gradually everyone came to accept as valid. It was over a century after the connection between punishment and justice had first been made before the government was able to dictate the content of punishment and impose the policies they saw fit. Yet we get little indication from the power/knowledge formula how protracted the struggle, to realise in the social world ideational connections that are quickly assented to intellectually, can be.

Once we discard the notion that knowledge, giving rise to power, must be of a particular type, we can see just how constraining the power/knowledge formula is. Even the most cursory reading of penal history will show that one of the greatest sources of tension within penal administration was the

need to balance the notions of reform and deterrence within the concept of punishment. The term 'tension' assumes that the two notions are in some way incompatible (I will address this matter in the next chapter), something which contemporaries and historians have accepted. Superficially it seems unlikely that people would simultaneously hold two mutually contradictory ideas but the Foucauldian approach rules this out tout court and assumes that reform and deterrence are implemented to secure the same end; this is another result of the extreme coherence of ideas which must characterise the power/knowledge approach and the suppression of any suggestion that beliefs and policies might be composed of inconsistent or incompatible parts. Ignatieff noted that 'Foucault's conception of the disciplinary world view, the *savoir* as he calls it, effectively forecloses on the possibility that the *savoir* itself was a site of contradiction, argument and conflict'.<sup>29</sup> One of the most anomalous aspects of the Foucauldian approach is how it is silent on the connection between reform and deterrence, *either suggesting that there was an effortless switch from one to the other or that each notion of punishment could be applicable to different categories of prisoner without this categorisation itself being a problem.*

It is too static a picture to assume that people unproblematically endorse mutually exclusive ideas and somehow labour under this burden without doing anything about it. This idea should be shunned for it assumes that the inconsistency of ideas and beliefs can be ignored (so denying them causal autonomy) and that there is nobody around to point this inconsistency. People may accept the conjunction of two such opposed ideas but try to do



something about it, either by accentuating one at the expense of the other and exercising cultural power to conceal this fact or else by seeking some kind of syncretic formula which would lessen the incompatibility between the two elements. There are two points of importance to note here: the first is that those who maintained the need to implement policies of reform and deterrence at the same time were placed neither in an advantageous position nor one of power as a result of holding on to such ideas, which questions the central tenet of the Foucauldian approach. Thus power is not automatically established through people upholding ideas and the endorsement of particular ideas may actually detract from it but may still be maintained nevertheless. The second point follows from our first observation that the endorsement of ideas does not confer power upon people but rather often to hold onto these ideas and to maintain them, the exercise of power is required to conceal the mutual incompatibility. It is quite the opposite from what one would expect from the power/knowledge formula which suggests that knowledge somehow confers power. These points will be substantiated by historical analysis in later chapters.

The power/knowledge formula fits well with a widely-held preconception, that while social structures may constrain people by virtue of the interests and obligations built into various positions in a social structure (a landlord must extract rent by virtue of his very position) the world of knowledge represents an arena of freedom. But positions may carry intellectual conditions as well: the position of a Christian priest means that he must uphold the apparently contradictory doctrine of there having existed a



person who was both divine and human; he may find this untenable and wish to transform the figure of Christ into a political agitator or radical iconoclast but what he must do is grapple with the accumulated doctrine which seems so contradictory. Similarly the curious position of criminal offenders meant that they occupied a strange twilight zone where they did not enjoy the same privileges as the law-abiding person but were not to be treated with utter disregard either. This can be summed up as the perennial debate between deterrence and reform which has continually bedevilled prison administrators and which could not be either ignored or disregarded. This is why the power/knowledge formula is singularly inappropriate for dealing with penal history since the dilemma of deterrence and/or reform can be traced from the inception of prisons up to the present day and in no way confers power. What must be done is find a method that allows us to estimate what kind of influence the dilemma of deterrence and/or reform had on prison administrators without either allowing ideas and beliefs or people to dominate. This would rob either ideas or people of an independent influence or else the other option would be to clasp them together so tightly that the respective influence of either is difficult to divine. Those who endorse the power/knowledge formula rarely fall into the first category of idealism (at least not explicitly), of viewing ideas and values as mysteriously transmitting themselves into the minds of people and being unquestioningly enacted but I did argue how this was the outcome with respect to those who were implementing these ideas; their formulation can often be taken as covering the latter two categories, as either viewing

ideas as a useful device to achieve certain ends or else melding them together. Such a method will fail to grasp precisely what problems are set by the taking up of certain ideas, since it insists on viewing ideas as perennially bound up in power struggles.

Thus in the case of two mutually opposed but unconnected ideas, the question of power does not arise immediately but only after the agents involved have surveyed the situation and then decided upon a course of action. The exercise of power may then arise as they seek to conceal the fact that they favour the primacy of one idea over another, as occurred in the prisons after 1865 when the primacy of reform was downplayed in favour of a policy of deterrence. This set of ideas did not constitute a power relationship but rather the contrary, it depended on the exercise of power for its continued survival in the social sphere.

There are other respects in which the supposed congruence of both power and knowledge occludes much of the complexity in any relationship between them. Any quick coupling of the two may conceal how much effort has to be put in before knowledge can yield any sort of benefit. An example is offered by the clash between the two competing models of penal discipline, what were called the separate and silent system. Again it is simplistic to suppose that the development of a novel form of prison discipline (the separate) which ostensibly seemed to be more lenient in that it offered less in the way of physical punishment but involved more psychological trauma, due to long periods of separation, placed its advocates in a position of power, or so the power/ knowledge formula would have us



believe. Eventually the supporters of the separate system enjoyed a victory of sorts but this cannot be simply assumed, the reason being that the advocacy of this system stirred many who were aghast at its cruelty and ill-effects on the prisoners' mental faculties which were incongruent with a supposed emphasis on reform into formulating a disciplinary model of their own which would avoid the other's defects.

The areas which were exposed to hostile fire were where the greatest gulf lay between the two models, namely the incompatibility between a prison sentence according to isolation or association; the two could not be simultaneously combined, therefore each side had to show up the demerits of either isolation or association and show how their own model could remedy such defects. People are driven to make repairs so that their model does not buckle under the strain of hostile criticism levelled by their opponents. So the models become more intricate and elaborate as criticism is either rebuked or accepted and so the model continually adapts and changes.

Though the aim is outright elimination of the opposing model and complete acceptance of their own, the outcome may be very different and wholly unintended and unexpected. Each side was intent on pin-pointing the weaknesses of the other with the result that the defects of both sides are fully exposed in the course of this public debate. It was public because it was not themselves they were trying to convince of the opposing model's futility but the wider public. There is no logical terminus at which one of the two sides might be said to have won and arguments are halted but debate might have become so elaborate and intricate that there is little



point in carrying on. The reason behind such fervent debate was not a love of competitive debate or even point-scoring but to convince those concerned that the alternative on offer was no good and their model of penal discipline was the best that could be hoped for and so sway the sceptical and unconverted. Debate between the two groups might become so intense that they lose sight of this end in concentrating on meeting the accusations and objections of the other side. Though the aim had been to introduce some clarity into the pool of ideas on offer, there had been so much thrashing about by both sides that it had become impossible for those neophytes in the debate to gauge where one system ended and the other began. Thus to ordinary ratepayers in the counties the debate had taken an increasingly outlandish turn and they were unwilling to commit themselves or their money - through increased rates - either way to what seemed like artificial and abstruse distinctions. Even if they had bothered to follow the debate it is unlikely that either model of prison discipline would have attracted a decisive number of supporters since there had been no compelling victory for either side, which is not to say that there had not been any skirmishes in which both sides had inflicted damage.

It is difficult to see how Foucault could trace such developments since the advance of knowledge automatically brings about the successful exercise of power. This either ignores or obscures the effort that must be put in to making ideas stick socially, i.e. have them accepted and implemented. Depending on the logical relationship between ideas, this will involve a corresponding amount of effort. Thus for ideas which contradict another set

of ideas which are promoted by another group, powerful enough to make their voice heard in the first place, it will be most difficult of all to have them accepted since opposition has to be overcome at both the ideational and social level. It is not surprising then that such ideas rarely survive in their original pristine state but are implemented having conceded various compromises. Not only does the power/knowledge formula fail to show how knowledge develops in such a scenario but also how the scenario of two opposing policies prevents any one group from seeing its favoured policies whole-heartedly endorsed, so calling into question any facile link between power and knowledge. Foucault does advert to the existence of a debate between these two competing schools of thought and notes that 'a whole series of different conflicts stemmed from the opposition between these two models [the separate and silent systems]: religious...medical...economic...architectural and administrative. This, no doubt, was why the argument lasted so long. But, at the heart of the debate, and making it possible, was this primary objective of carceral action: *coercive individualisation* [my italics], by the termination of any relation that is not supervised by authority or arranged according to hierarchy'.<sup>31</sup>

Appearing to concede pluralism at the level of ideas Foucault reduces any such subsequent debate to an epiphenomenon which is unable to disturb the end it serves. Despite the agents' own convictions that the outcome of the debate would influence greatly how the project of reform would proceed, Foucault believes that it is unimportant which model should emerge triumphant since they both attain to the same end. He displays scant



awareness of the point I stressed above, that the result of such vitriolic competition may be what neither party had expected or wanted, and the end desired by each is subverted by the process of competition, delivering a result which was wholly unintended. This is an outcome that cannot be encompassed by Foucault since there is never any social debate in the first place which could significantly affect the ideas first outlined. His method rules out a priori that various policies are elaborated in the tussle of social life (because they must immediately give rise to power) and so is blind to the possibility of an outcome being wrought by all but intended by none.

It is a constant temptation for devotees of the power/knowledge formula to write histories which rule out fractures and pluralism both at the level of ideas (since the existence of alternatives makes it harder for any one school of thought to predominate) and at the social level; even if people are discontented with their present set of circumstances they remain handicapped in their attempt to articulate an agenda for change since there is one 'dominant ideology' with few cracks in its facade. Hence the puzzlement over Foucault's talk of resistance as they asked, resisting in the name of what? People have always wondered how he could conceive of successful resistance within the confines of his own theory. Once he admits that power produces truth (and for those who doubt that he meant this should look at *Discipline and Punish*, p.194 and *Power/ Knowledge*, p.51) and that this truth is internally coherent, there seems scant possibility that those who have been 'normalised' could ever see through the dominant regime of truth and denounce it. Hence the occlusion of the role of the prisoners in successfully



agitating for change because the fact that they could bring ideas that conflict with what was imposed from above through different life-experiences is ruled out by this method.

I have criticised the power/knowledge formula for putting a misplaced emphasis upon power and for implying that workable knowledge is somehow brought into the social world as a finished product, ready to be utilised. Yet as I have argued and will show even with the most favourable scenario, much work remains to be done even after the initial favourable links are grasped and the potential benefits suspected and this process of development may encounter resistance. The Commissioners, assigned to reform the criminal law and render punishments more equitable in the 1840s, struggled to arrive at a proportionate list of punishments as they debated how many offences there should be with the number of different classifiable offences rising from four in their 2nd report to 45 in the 7th report. Foucault gives little indication of the toil that had to be undergone before people could make use of any knowledge.

Much is made of the development of criminology by Garland in his book, *Punishment and Welfare*, and he concedes that it was not compatible with the demands of classical justice. What was innovatory about criminology was that it located the explanation of crime in causes external to the individual will such as hereditariness. Closer investigation revealed that there were far more possibilities on offer than was originally supposed and so the project demanded yet more attention. Lombroso believed that he could attribute criminal behaviour to one factor, that of the physical

constitution of the individual, but such a theory was soon discarded by his successors who nevertheless followed his lead in seeking causes external to the individual behaviour to explain his or her behaviour.

Since that state of play in such a scenario is so unstable with one theory liable to be superseded by another which can better explain what the other could not, it is difficult to believe it is solely down to intellectual factors alone which explain why any one theory rather than another should gain a position of prominence. The advancement of one idea cannot be explained solely by its theoretical virtues since it is highly unlikely that any one position represents an irreproachable refutation of its rival. Thus it is not the knowledge-items alone which explain why they have been adopted by the powerful but more of a complex interplay between both the ideational and the social. We must examine what kind of congruence there is between the group and the ideas that it endorses to see why this and not another set of ideas were selected. This is not to say that I endorse Garland's approach of entirely attributing the success of certain ideas to social factors but rather to the congruence of the logical relationships of ideas to group interests.

In the area of penal history that we will examine there was considerable suspicion over any departure from the principles of classical justice so that the use of the new science of criminology was extremely restricted. To estimate the social reception of the set of ideas which can be classified as criminological doctrines two factors must be borne in mind. The first is the extent of satisfaction or discontent with the set of existing policies: do they



adequately explain and cope with existing problems or are they seen as increasingly irrelevant? Secondly how much of a departure would incorporating the new ideas actually be? Since such ideas are an uncertain bet (no conclusive evidence in favour of one theory or another) the more abrupt the break the less willing people will be to back such a departure from custom. This is not because people are unthinking traditionalists but simply because the cost and thus return from backing these ideas seems so unsure, though this attitude will vary depending on how discontented with their lot in the current set of penal practices. The lack of general acclaim for these novel ideas should not be seen as an obstacle but a spur to development as each school attempts to improve upon their findings in an attempt to gain acceptance beyond their own particular group.

### **1.3 The unity of control and its mechanisms**

Those who have sought to revise Foucault but still retain his essential thesis have turned to the development of criminology since it seemed that it possessed the elements necessary to facilitate control of each criminal through individual knowledge and care. But beyond vague intimations that such programs for action were adopted, little evidence is produced to show that this was actually the case. Such accounts are curiously triumphalist but bloodless, for they fail to show how cultural domination is produced, whether through persuasion or coercion. By this I do not mean that simply the prisoners themselves had to be convinced of the legitimacy of the actions that were being taken (supposedly) for their welfare, a consideration



which is often passed over, but also so did many of the penal administrators and members of the judiciary who had been schooled in the principles of classical justice. We are asked to take for granted that all these were somehow persuaded that a conversion to radically different principles of justice was for the better; so not only is the how of cultural domination being ignored but the when remains extremely unconvincing. By this I mean that the failure to detail adequately how various groups were convinced of the need to adopt new sentencing measures and methods of punishment gives a temporally truncated account as the reception of these new ideas is squeezed into an implausible time-frame, as the obstacles to such an outcome are overlooked. Prior to the development of the new science of criminology there existed a previous ideational framework and so I am making the simple point that social agents never begin their efforts to fulfil their wishes completely *de novo*. This means that the previously existing framework, be it structural or cultural, and here we are dealing with the latter, must figure in any account of change. Depending on how the innovative developments fit with it, whether they are in accord or opposition with it, this will accelerate or impede change. I recounted that since criminology with its variable punishments was in opposition to the ideas of classical justice, we should expect change to be tardy; this would be so even if everyone had sanctioned such a break with the previously established principles of justice for these could not simply be ditched overnight. Since many people were against these innovations any ideational change would be even slower. I have faulted the power/knowledge school

twice for lack of attention to temporality in accounts of the elaboration of knowledge. Firstly because they seemed to suggest that knowledge suddenly comes about as a complete package, lacking nothing and ready to be used, which fails to note that often much work remains to be done, whether it is to confirm initial suspicions or rebut hostile criticism. Secondly because they see society made up simply of people and so initiating change is just a matter of persuading people to accept it. Practices do not change just because of persuasion as the reasons that inform such practices must be addressed as well; time will have to be spent in deciding just how much of the former practice must be amended or discarded in order to suit the parameters of the new policies.

Any theory which asserts that developments in punishment were part of an effort to secure more effective control must be able to detail fully one of the how was such control produced. This is one of the weakest parts of the recent revisionist school of penal histories as they assume that because control was attempted, and it is a questionable assumption that the reform movement was just this, the result was a foregone conclusion in favour of those who had initiated such changes.

But to question the revisionist account on this score we do not even have to go this far; we can take one step back and question why should we label the programs undertaken in the prisons as efforts in social control. For what proponents of this train of thought usually mean by this is that the prison was usually an integral part of an attempt by the ruling class to



maintain control. This thesis, however, carries some unlikely assumptions within itself. Ignatieff shows up these assumptions when he writes that

it would be wrong to think of these constitutencies of institutional reformers as acting for their class or expressing the logic of its strategic imperatives. This would make them into ventriloquists for a clairvoyant and unanimous social consensus.<sup>32</sup>

If these criticisms are not acknowledged, pluralism is excluded at both the social and cultural levels so it is no surprise that we end up with a monistic theory, i.e. there seems to be only one way of doing things with no other viable alternatives. Those on whom these policies are being imposed have no option but to accept.<sup>33</sup>

Once this exclusion of pluralism is dropped and we recognise that there was immense debate and development as a result of disagreement among those who had an interest in penal discipline, the possibility of change arises through the admission of such divisiveness. Thus the prisons could not be reflecting the bias of the class system alone, for there were many groups who perceived that their own material welfare depended on the outcome of the penal debates and so pitched in with their own contributions so that the direction of policies might reflect their interests. Such groups as the prison officers, the incipient movement of probation officers and the Church of England missionaries who were involved in the forerunner of the probation movement all had different ideas over what shape penal policies should take in the early part of this century. The first two groups were trying to obtain better conditions for themselves, in the case of the prison officers attempting



to forestall the burgeoning reform movement which made their task more complex whilst also devaluing the role they played. The probation officers were in direct conflict with the church missionaries as they wanted a more professional service relying less on the individual influence that was so vital to the work of the missionaries and more on clinical diagnosis.<sup>34</sup> Each body was able to make a valid case for itself, as the prison officers called for the primacy of deterrence in any prison service and the latter two bodies invoked two incompatible notions of reform. The Church missionaries had not seen the assault on their good work completely rebuffed so their insecurity had not been completely allayed but the probation service, though it had been granted some concessions still felt that it had not secured a fully professional service so that it was only spurred to greater efforts to achieve this goal.

The revisionist account fails to notice how a change in the organisation of the prison service (a structural arrangement) eventually had far-reaching effects on the cultural level also. The continuing professionalisation of the prison service brought into being a group of people who recognised that they had common interests and that these were often gained at the expense of the prisoners. After the Gladstone Committee's report, reform began to have a greater role and this in turn caused re-arrangements at the structural level, an effect which rebounded upon the cultural level as people coalesced to form a distinct group to agitate for their own conception of reform. As the prison administrators tried to meet the incessant demands for reform, various groups seized this moment to press their own agenda. Thus the fact

that the idea of punishment was itself based upon conceptual incoherence represented a point which could be exploited by those who wished to see changes in how the prison service was run; after some of the initial demands were granted, those groups brought into being by the initial thrust for change acted back upon the prison administrators in seeking further changes.

It is no accident that the power/knowledge school cannot include such an instance of an institutional rearrangement affecting ideas, as they work with an emaciated theory of institutional structure since it is only through treating structure as a conduit possessing negligible friction or resistance that pluralism can be kept at bay. If we were to allow structure a real presence this would be a crucial influence in fostering pluralism so upsetting the power/ knowledge thesis. If structure were granted a real presence and not just construed as the sum of the various roles within it, then it would have to be admitted that this structure may exercise a more decisive influence upon the conduct of those who worked within it and were affected by it than some general social change such as mass democratisation. Thus the prison officers, post 1895, were not impressed by calls for more reforms since it meant that they would lose out if the existing arrangements were cancelled and so tried to resist the reforms to protect their interests. They evaluated the changes affecting them and acted according to their perceptions; this was not a uniform response and so makes the point that structure determines nobody. Some decided to protest in a militant fashion by striking but others were more deferential to authority and vented their



frustration through unofficial publications. Yet the need for the power/knowledge thesis to cultivate monism ensures that occurrences such as these are ignored but at the cost of assuming that the success of cultural domination is a forgone conclusion. Little wonder, then, that a favoured metaphor for power of those inspired by Foucault is that of the electrical circuit,<sup>29</sup> a flow without resistance. It is resistance and opposition, substantial and not ephemeral, which is most amiss in the power/knowledge thesis and the lack of a genuinely realist notion of structure (realism being understood in a causally efficacious sense) contributes a great deal to the absence of resistance. This means that social analysis must depart from general theories such as those of the social control or cultural diffusion schools since these assume the transmission, interpretation and assimilation of ideas to be unproblematic. A robust theory of structure would ensure that benefits and opportunity costs are distributed unevenly and so various groups would struggle differently for innovations or persistence so leading directly to pluralism. Change is a far less smooth affair since now there are obstacles which can obstruct it and alter it in ways unforeseen by its original progenitors.

We get few glimmerings of such change being decisive in the work of Foucault as he dismisses incidents like these as ephemeral to any decisive transformation of the prisons, as he asks 'is not the supposed failure part of the functioning of prisons?'<sup>35</sup> Any changes that could be brought about can be dismissed as ineffectual for they fail to upset the function that Foucault imputes to the prison that I discussed earlier. Why does Foucault seek



refuge in a badly worked-out functionalism? Is it connected to his methodology of seeing knowledge bound up with power? Let us recall that Foucault assumed that the extension of the prison service served one genuine purpose which was to achieve a more economical distribution of power, not to punish less but to punish better. The question remains that the criteria used to measure any such improvement in punishment may actually conflict; for example reform might achieve its purpose by cutting the rate of recidivism but general deterrence might be said to have failed as the crime rate had increased. He gives no such indication that any such criteria to measure the effectiveness of the prison service might be in conflict.

Having assumed that the prison serves one express purpose (it being the question-begging one of effectiveness) he is then bound to dismiss all changes which militate against his own conception of effectiveness, for instance those periods which have seen a greater emphasis on deterrence with little regard for the normalising tools such as training and education, as unimportant to the real function of the prison which is to perpetrate a more subtle kind of discipline. Again we see that as a result of assumptions about monism at the ideational level (there is only one, but unstated, way of measuring the effectiveness of prisons) he is unable to cope with the historical complexity of the changes in the prison service. What could he say of the so-called reactionary period between 1865-95 when policies of deterrence were pursued with vigour and notions of reform were only paid lip-service?<sup>36</sup> If such a period failed to upset the new economy of the prison service, surely we have to ask what would; all we have from Foucault

is an opaque denial that it could, accompanied by a refusal to spell out how we could assess the true purpose of the prison.

It can only be a matter of speculation as to why Foucault takes up such a position but, as stated, I believe it is bound up with his refusal to concede ideational pluralism. All ideas other than those designated by him as serving the purpose of effectiveness of the prisons are disregarded as non-consequential. Foucault seems to have worked from the belief that since the new orientation of the prisons was dedicated to the 'maximisation of regulatory power'<sup>37</sup>, it could not do this in an equivocal fashion, having purposes that were not about normalising prisoners. The problem with such accounts is that

'aspects of [modern] punishment which appear non-utilitarian or dysfunctional with regard to control values are either excluded from analysis or else accounted for by reference to latent functions and concealed utilities'.<sup>38</sup>

#### **1.4 The method of domination**

There are other elements at work in Foucault's account which mar its worth as a viable social theory; the chief defect for which I have impugned this theory is its refusal to recognise pluralism at both ideational and social levels. I now wish to return to the question of the how of cultural domination. In Foucault's account the picture is of a set of ideas, embodied in various regulations and routines within the prison, which mould and form the individual in a manner desired by the administrators. Foucauldians would wish to point out that they do not define power in exclusively negative

terms<sup>39</sup> so that the changes effected upon the individual prisoner may not necessarily be damaging. This still does not explain why such changes were accepted: was this because the prisoners agreed with the prison officers that such changes were for the better or did they comply as a result of coercion (or the threat of)?

It is hard to see why such a transformation should come about as a result of mutual agreement for that would imply that the prisoners saw some advantage in the various schemes established by the penal authorities. Foucault asks, 'what, then, is the use of prison labour? Not profit; nor even the formation of a useful skill; but the constitution of a power relation, an empty economic form, a schema of individual submission and of adjustment to a production apparatus'.<sup>40</sup> Foucault could reply that the prisoners believed that such schemes were useful but did not see through the ruse that prison labour inculcated within them habits beneficial to the maintenance of social order. If we accept this it becomes harder to retain the thesis about the effects of power being positive, for if labour taught the prisoners nothing but served some underlying function, can we still say that power had a beneficial effect for the prisoners?

For all the hints of prisoners being empowered they occupy a marginal position in Foucault's narrative. They mutely accept the processes of indoctrination with little reflection on whether they would benefit from them. There is no indication that prisoners have their own beliefs about how they should be treated: 'a crucial element in the process [of discipline] is always the subjective orientation of the person concerned which may embrace the



imposed role or may instead resist it'.<sup>41</sup> We must avoid treating the 'prisoners' as some kind of unified body. They differed in skills, resources, status, education and some were differentiated by even more basic categories such as age or sex. Some such as the Fenian prisoners effected change in a uniform prison system through a highly organised and well-supported campaign to grant them the status of political prisoners. Others such as women and children by their very presence in a system designed primarily for the deterrence of adult male criminals brought about change, not by their own actions, but because they had gained the sympathy of others. So here we see that it is an unnecessary condition for a policy-change that there be some group with a pre-formed opinion as to how they should be treated. Change did not come about solely when prisoners were being badly treated and they sought arguments to give credence to the cries for relief. Even when reforms were afoot toward making conditions more relaxed for prisoners at the preventive detention camps, the prisoners seized the initiative and demanded conditions more in line with their own expectations.

It was because prisoners so often seemed to be unreceptive to the values and ideals being propagated within the prisons and the lack of an effect on the crime-rate that there resulted so many changes in the way prison was organised. From the outset where there was an emphasis upon reform and after this had failed to still the crime-rate it was decided that prisoners would respond better to discipline of a deterrent nature. Even as this policy was accompanied by a falling crime-rate, attention remained riveted on those who had succumbed to criminal ways again after leaving prison so that

there were calls for new policies to be devised that would successfully deal with this trenchant problem. Therefore, one of the greatest factors behind change was not the successful transmission of the prison's message to its inmates but rather the perceived failure of this. Prisoners for whatever reason had failed to absorb the message of particular penal regimes and this led to calls for the regime to be placed on a new, more effective footing.

It is not enough to cite the locus of cultural dissemination and assume that because there was an attempt to inculcate certain ideas among certain people that success was a foregone conclusion, which was the first objection I lodged against the power/knowledge thesis. Even if the changes proposed do benefit those who will be subjected to them we must show why people opted for them. It may be as a result of negotiation or both parties agreeing it was for the best or else if such changes of attitude or lifestyle were not undertaken voluntarily we must show how this was achieved. Was the use of power only threatened or actually used? On what basis did this power rest, for example superior force or legal restrictions? Even if power is involved this hardly renders the transition intelligible yet this is how it appears with Foucault. He wants to say the changes introduced as a result of the policies of individualisation within the prisons should not be seen as detrimental but he also believes that these were not advantageous to the prisoners since 'prison labour aimed to teach them nothing'<sup>42</sup> but he does not try to reconcile these two positions. Why did the prisoners not question the impact, beneficial or otherwise, of the policies adopted in the prisons? Is this not introducing 'cultural dopes' who unquestioningly accept all ideas that



are placed before them. As a self-confessed revisionist historian writes, 'Foucault's account consistently portrays authority as having a clear field, able to carry out its strategies without let or hindrance from its own legal principles [note how Ignatieff implicitly accepts that institutionalised beliefs can constrain action] or from popular opposition. Power is always seen as a strategy, as an instrumentality, never as a social relation between contending forces'<sup>43</sup>; i.e. power is defined with reference to one party alone, not relationally which means that it is perceived as an a priori capacity to obtain dominance usually without failure.

Despite the massive disadvantages in terms of resources with which the prisoners were faced, they were by no means forced to accept what was expected of them. Prison policies had always veered between trying to effect a change of heart as opposed to an apparent change of habit. When the stress was upon deterrence this was not really an issue since there was not much of a response to be called for from the prisoners. But when the question of recidivism was on the agenda again and some held that it was not enough that prisoners be cowed into submission for the duration of their sentence with the hope that such conditions would deter them from future crime once they were released, policies designed to effect more permanent changes were introduced. Such are the policies that Foucault talks about when he writes of punishment designed to fit the individual but he fails to note that such policies called for a voluntary response, a response which could easily be dissembled. The image of the prisoners we get from Foucault is that of animals who are caught, tamed through certain routines



and then released back into the wild never realising that they have been tagged and their every movement is supervised.

I will provide a brief summary of the criticisms of Foucault which flow from his development of the power/knowledge formula which compacts the new concepts together too hastily and is unable to bring the complexity of their relationship to light. The foremost defect is that this method denies pluralism and endorses extreme coherence at both the intellectual and social level with several disastrous results ensuing.

1. Power is given too much emphasis as one particular configuration of ideas, a comprehensive and systematically linked set of ideas without a rival, is assumed to be paradigmatic of all ideational relationships and these come about ready-made.

2. People are squeezed out of having any meaningful role in this account since they neither figure in having an input into these ready-made ideas and because the ideas are so tightly bound together there is scant scope for criticism.

3. There is an extreme assumption of coherence which, coupled with the lack of pluralism means that there is little chance of divisiveness even among people who share the same interests. This ensures there is little room for debate so that we are given a temporally truncated account of how ideas develop.

4. The how of cultural domination, the mechanism by which this is achieved, can never seriously be addressed simply because its success is a forgone conclusion. This is because Foucault assumes that there will not be a subordinate culture with which the socially marginalised could compare and contrast the ideas that were being offered to them in the prison and so accept or reject them on the basis of their past experiences. Thus the acceptance of ideas depends partly on evaluation by those who must endorse them and this evaluation will inevitably be interest-based.

5. The structure of particular institutions and systems and their influence must be discounted since a realist notion of structure would foster the detection of pluralism at the social level. This would undercut the monism of the power/knowledge school and the unquestioned success of any one set of ideas.

6. Since the success of the prison is a closed book, all the events which might seem to be failures are dismissed as we are reassured that the prison continues to fulfil its true function. Incidents that might seem to have brought about real change are disregarded but because of the complacency concerning cultural domination, we are never told what kind of event or circumstance might tell against such success.

It is my conclusion that given such results, any further endorsement or adoption of the power/knowledge formula is untenable since it paints a picture of a surveillance society within which no-one can escape the scrutiny of the powerful; nor is there any realistic prospect of change since

it is unclear why such policies were ever adopted in the first place. In fact, the only possibility of change seems to reside in an even more efficient means of punishment being discovered, one that seems more benevolent but is more insidious than its predecessor. Not only does the power/knowledge formula distort actual history and present-day reality but fails to show how social theory should proceed by leading it into a morass of implausibilities.

I will attempt to do so by outlining how a method which will allow social theory to gain some purchase on the complexity of social life by indicating just what the influence of knowledge might be. If the aim is of understanding just what this influence might consist, knowledge itself must first be examined. By this I mean that the ideas which make up various programs, policies and agendas must be examined for their consistency or incompatibility with each other; this will determine how easily or how difficult it is to follow through on them. The influence that they exert will however never leave human agency with no option but to dutifully enact these ideas according to the dictates of this influence for actors will always have the choice whether to do this or to incur a greater cost by disregarding this logic. What such a method will permit us to do is to estimate the relative contribution of both the conditions of action and the human action which is bounded by these conditions. I will now specify, in more detail, what this method is in the next chapter.



## 2. Ideas within penal history

The history of prisons has usually been represented as a period of progressive amelioration or more recently, the very reforms evidenced in the former account as a sign of progress, have been said to be a more subtle means of achieving the original goal for which the prisons were intended, control and emasculation of a criminal class. Both these accounts dismiss as unimportant the tensions which characterised the notion of punishment within the prisons from their inception. The first account sees the prisons as moving away from allegedly cruel practices commonly associated with ideas of deterrence, whereby the prisoner was treated as a means towards cowing potential criminals into non-committal of crimes, toward more lenient practices usually linked to greater emphasis upon reform. The second sees no inconsistency either between the idea of deterrence and reform viewing the latter as a more amenable method of controlling prisoners so that the former could be discounted.

What needs to be captured in an account of the development of the prisons is how the various ideas related to punishment influenced the people who ran the prisons. Once we have discounted the notion that the implementation of any set of ideas or beliefs leads to power, we need some method which allows us to characterise adequately the influence of ideas. This must be done without undercutting human autonomy which the power/knowledge formula does, despite the dependence of knowledge upon social factors. Equally we must grant ideas a real presence by detailing how

they make some actions much more difficult than others because only then can we avoid the fallacious belief that social actors are free to do anything they like in the realm of ideas.

## **2.1 Grasping the influence and effect of ideas**

I stated earlier that all action takes place in a prior framework; this is true of both action which might be classified as material, such as strike action, and intellectual, such as developing a novel doctrine. This assumption has two consequences: the first is that this framework will partially determine the courses of action available (one cannot strike in a feudal society) and that this framework has to be confronted regardless of the personal predispositions of the agents involved. I shall be making the case that the dilemma of how to treat prisoners was bifurcated between the options of reform and deterrence and no matter whether penal administrators' preference was for one or the other they had to confront the problem of dealing with both and this conditioned all their future actions.

The term 'conditional influence' is crucial: 'conditional' means that the framework doesn't determine anything but merely sets a premium on certain types of action and so leaves a space for agency and freedom to discount the influence; 'influence' denotes how a structural or cultural framework works as opposed to human agency for whom power is a prerogative. Influence may be operative in the absence of any intention whatsoever as in the case of the weather affecting one's plans or the moroseness of a partner affecting your mood; intention is not involved here since the result is not

desired. Only if a result is intended can we speak of power being exercised and since intentionality is the prerogative of human agency only agents can exercise power. Thus the frameworks of human action shape but do not determine the course of human action. This is another reason why we must refute the notion that power and knowledge are always connected for, translated into a more sociological idiom, this means that the frameworks exert their influence regardless of the desires of the respective agents; now while this may hold true in specific contexts, for example where knowledge proves to be of universal benefit, we should not presume it to be universally valid.

It would be another error to believe that agents are able to escape the conditioning of these frameworks especially when institutionalised roles and policies are involved, as in the case of prisons. Those who were running prisons from the outset had to confront the extremely diffuse and uncoordinated state that characterised the local prisons and had to take heed of the beliefs concerning of what punishment should consist. Furthermore each position brings with it a vested interest, though that which the interest represents should not be assumed to be always a felicitous situation, which agents would be either loath to give up or eager to transform, such as the prisoner campaigning for better treatment. That many prisoners might be unable to do so because of their lowly social position does not mean that the structured interest does not exist for then social conditions have proven to be more influential than structural conditions.



Interests always represent presumptive motives for acting, but actors may fail to recognise their interests, and even when they do recognise them, they may choose to act against them in favour of other considerations. However, since when actors fail to act in their interests they incur some cost, it is expected that actors generally will act in conformity with their interests. Even here, that does not necessarily mean that interests determine specific actions. Actors frequently respond to their structured interests in creative ways that in principle cannot be predicted in advance.<sup>1</sup>

The attribution of vested interests and the opportunity costs that were incurred if these interests were not acted upon was one of the elements that was most evidently lacking in the Foucauldian account of the prisons. I said that this was partly due to the absence of a realist notion of structure which motivates people to defend or transform the positions associated with them; no mention was made of the truculence of the prison officers as they were discomfited by the increasing prominence given to policies of reform which made their task more difficult and which gave them little in return. Likewise the judiciary had a vested interest in defending the classical model of justice since it fitted in with their presumptions and their training and so they could not easily be shifted from defending this interest. This is not to say that individual judges could not act against their interests but that there were costs associated with doing so.

I have outlined how the frameworks of action can condition the activities of agents but the precise nature of this influence is still very vague. It seems to be left to the discretion of agents to decide how best to defend their interests; if this is so then we are left with an extremely indeterminate theory for it can tell us nothing about what course of action agents might take in a particular scenario. Is there anything that can be done to improve upon this situation?

The frameworks of action must first be examined in a more precise fashion so we might ascertain if these frameworks are characterised by strain or compatibility (this is analogous to the distinction made by those of a functionalist hue about the parts of a system being integrated or not). Thus if we look at the foremost intellectual framework confronting prison administrators, the dilemma between reform and deterrence, we can characterise this as a state of malintegration since the two ideas of punishment do not fit easily together and are, in fact, incompatible. This strain between parts of a framework is experienced by agents, here penal administrators, as a frustration since their interest in running a smoothly function prison system is undermined by the presence of these incompatible notions and so to secure their interests they feel compelled to do something to resolve the dilemma that confronts them. More can be uncovered for as Archer says

the mechanism by which the 'parts' causally influence the 'people' can become a good deal sharper than the rudimentary notion of their shaping frustrating or rewarding situations in

relation to agents' vested interests. Instead it is possible to show how quite distinctive situational logics, which predispose agents towards specific courses of action for the promotion of their interests, are created by the relations within and between the various ['parts'].<sup>2</sup>

What is meant by the term situational logic is that depending on the 'fit' between the parts of a framework, whether they are incompatible or not, will have an effect on the type of action that seems most propitious. Furthermore the situational logic will vary depending on whether the connection between the parts is one of contingency or necessity, i.e. is it possible to conceive of these parts existing apart from one another or not? Since the situational logic represents the conditional influence of these frameworks, actors are not obligated to follow the logic but may decide, for whatever reasons, to buck it. Not only will structural conditioning allow us to recognise who will act to defend the status quo or promote change but it will also indicate what kind of action they will undertake to achieve these ends. If parts of a framework are necessarily linked but are incompatible then those seeking to defend this conception of punishment will either seek some kind of syncretic formula to efface the most blatant differences or else try to conceal that one element is being favoured at the expense of another. I will now outline how various ideas germane to penal theory can be so conceptualised.



## 2.2 Four cultural frameworks and their situational logics

The method elaborated has been termed analytical dualism for though it admits that the conditions of action and agency itself are often bound together in social life the only way of estimating their respective influence upon consequences is to examine them separately. Thus the dualism that is being advocated is a methodological one; the frameworks do not reside in some reified realm but only by extracting them from their immersion in action, hence an analytic method, can we establish their causal powers.

One of the most important ideational frameworks which has already been adverted to is the tension between the two elements of punishment, reform and deterrence, both of which were deemed essential to punishment within the prisons and neither of which could be discarded even though this was manifestly a less troublesome option. I want to argue two points: (i) that it is impossible to disassociate reform and deterrence as ideas of punishment and (ii) that the two are incompatible. Doing this will permit me to argue that the connection between them is not simply a matter of some people being inclined to view punishment in a schismatic light but that the very notion of penal punishment is riven by this incompatibility. I stress that I am not trying to provide a justification for punishment but an explanation of its complexities as an idea and their implications.

Punishment by a recognised authority takes place after a law has been transgressed and it serves to bring home to the offender and any potential audience the seriousness of his misdeed. This it does by carrying out a pre-formulated response to any such transgression which is intended to act as a

deterrent and an apposite rejoinder to the act of law-breaking. A deterrent is only effective if the offender and potential criminals believe it will be used so that the offender is compelled to undergo suffering to retain the effectiveness of the deterrent and prevent future crimes. Punishment is always a reminder not to transgress again but it is not only this. It also involves an effort to communicate to the offender the seriousness of his transgression and why it is wrong; hence there is little point in deceiving the public through a sham punishment, as Bentham would have wished, hoping to retain the deterrent effect yet to minimise the sum total of pain involved. If we hit a dog with a newspaper after he has fouled the carpet we do not expect him to understand why his action is forbidden and deserves punishment nor do we search for a penalty which reflects his degree of culpability. Such notions are inappropriate and punishment is driven by a purely pragmatic concern- what actions will ensure that his action will not be repeated.

However, humans are not animals since they have the capacity to offer reasons for their actions which are very often the causes of these same actions. The state of mind of the offender is crucial: did he knowingly cause a prohibited harm with full awareness of the consequences? Punishment is, then, a reflection of the degree of culpability of the offender and this necessitates an analysis of his mental state at the time of the offence. As they have this capacity to reflect, punishment cannot be considered solely for its deterrent purposes though it may be interpreted as solely comprised of this, especially by its recipients; it must also be



understood as an effort to convince the offender of the wrongfulness of his deed. This is what we call the reformatory function of punishment and it is done by reasoning with the individual or situating them so that they consider their past actions in the hope that they will renounce and denounce their past offences. Forsythe calls this the 'reclamation of the individual' through which

faulty parts of the attitude of the individual prisoner towards himself, towards others and towards the wider society may be changed at more than a mere calculative level. Fundamental and permanent alteration may consequently be achieved in those aspects of behaviour which are criminal or seen as crime-linked, and a reunion with law-obedient society can be brought about.<sup>3</sup>

This entails that punishment is not similar to the way we treat brute animals, for we do not delve into their state of mind when they do something that is forbidden nor do we even consider that they could reflect upon their actions and be remorseful about them. As we are dealing with reflective beings when we punish people, punishment is meant to provoke them into such reflection on their acts; but neither is it completely dissimilar to the way we treat animals; in Von Hirsch's phrase 'an angel would require no appeals to prudence, and a brute could not be appealed to through censure'.<sup>4</sup> This idea of man being divided between his rational and sensual elements has an ancient lineage and is implicit in many ideas of punishment: we are, as human beings, susceptible to both counsels of prudence and wisdom, we can recognise that we should not repeat action



both from motives of self-interest and morality. Since a person is neither angel nor beast, punishment, as a human institution, must try to cover both these aspects; it can neither be *just* an appeal to her conscience nor an solely an effort to cow her into submission. This is what makes punishment so unstable, as it tries to straddle both the gulf between both reform and deterrence and frequently slips between the two.

Deterrence is vested in suffering bringing home to the offender and potential law-breakers the seriousness of his deed and gives them an incentive not to offend again; reform is attempted whilst suffering is being undergone and the offender's state of deprivation is meant to provoke him into reflection upon his act. If there were no suffering then it is difficult to see how there could be any talk of punishment so that reform is always balanced by deterrence. The idea of punishment is caught between these two notions: the infliction of suffering to provide a deterrent and to help the offender realise why his deed was wrong. But does not the deterrent function squeeze out reform by assuming its function- to convey a message to the offender- and by obstructing its implementation?

Reform is a fundamentally a form of persuasion as it seeks to convince its recipient through moral reasoning to alter his beliefs and actions; persuasion can assume many guises with some bordering on coercion so that deterrence could be classified as a form of persuasion. The difference then, between reform and deterrence, is not that the former tries to induce reflection and the latter does not, for it does albeit of a calculating, self-interested kind: what must I do to avoid the repetition of such

unpleasantness to me. Rather the former strives to provide either an opportunity for the offender to reflect on why his deeds are wrong or seeks to offer such moral reasons to him. Deterrence is unconcerned whether the offender has understood why his act was wrong - hence its affinity with how we treat animals- but imprints the consequences of re-offending upon the people's minds so that they will refrain from offending out of fear. Reform is always in danger of being squeezed out by deterrence as unpleasant consequences are essential to the idea of punishment; the difficulty is finding a space within this unpleasantness where there is an opportunity for persuasion; not to do so is to admit that humans are being treated as brute animals.

This was very much what happened when prison conditions began to be transformed in the late 18<sup>th</sup> century. The so-called reformers wished to improve prison conditions because they believed that the external conditions within the prison would be replicated within the internal states of the prisoners' minds so filth outside would produce a degradation in the prisoner's conscience; they believed that if reform was to have any chance of success, if the conscience of the prisoner was to be awakened, he would first have to reside in orderly conditions so that a reconstruction of the prisons would have to ensue. As the material conditions inside the prison began to become more ordered and hygienic, the difference between what prevailed inside and the conditions in the world outside the prison walls became more apparent: inmates were enjoying better living conditions than those who had not committed any offence. If nothing was done prison



would lose its meaning as a place of punishment, as conditions inside had to be more unpleasant and exacting than those that obtained outside for the worst-off in society - the doctrine of 'less eligibility' - otherwise prisoners were not suffering any deprivation since there were no unpleasant consequences in being sent to a prison. Reformers could maintain the doctrine of 'less eligibility' in two ways: the first was by doing nothing, letting the squalor fester and leaving conditions as they were before; the second was that they could devise some new way of making the prison a place of suffering: 'the justices and gaolers exercised their ingenuity in developing completely useless tasks merely to "torment" the prisoners'.<sup>5</sup> The word 'torment' is Bentham's; it indicates how a utilitarian logic blinded him to the conflicting elements of punishment; what looks like a senseless infliction of pain to the utilitarian becomes comprehensible when the necessity of balancing reform and deterrence is borne in mind.

Once the prison reformers had taken it upon themselves to cleanse the prisons 'punitive labour was the inevitable concomitant of improving prison conditions';<sup>6</sup> inevitable because the reformers had to find some way of making conditions within the prison more onerous if the prison was to remain a place of punishment; if they had done nothing to counter-balance the improvement in material conditions punishment would have lost its meaning as essentially involving suffering and/or deprivation.

Yet this introduction of elements of deterrence had precisely the consequences that were predicted above, namely that they would tend to exclude traces of reform. De Lacy writes that there was a 'fundamental



conflict between the attempt to provide particularly odious labour for felons and a desire to encourage reformation. By making work itself a punishment, hard labour was unlikely to establish a positive attitude among inmates'.<sup>7</sup>

Yet why is there this alleged 'fundamental conflict' between reform and deterrence? The assumption that deterrence and reform are indeed incompatible is accepted by many, especially historians- Thomas calls them 'two mutually exclusive tasks'<sup>8</sup>- but is seldom examined. What might be the basis of this assumption?

Sometimes it seems to be that deterrence is supposed to operate with an utter disregard for the individual offender on which it is working but this is only true of general deterrence. Here 'the offender is used as a means to achieving a diffused social goal and [there are] no assumptions about the effect of the punishment on or its significance for her'.<sup>9</sup> The key phrase is 'used as a means' since this indicates that the welfare of the individual offender may be completely sacrificed to achieve the end of a reduction in punishment and little concern is evinced for the effect of punishment upon the individual offender. This is the basis of fears of disproportionate punishment being wreaked upon the offender if it helped to decrease the level of crime (this is to say nothing about fears of the punishment of the innocent).

Can the same fears be raised about individual deterrence and how is it distinguished from general deterrence? As the term indicates, the distinction resides in the fact that the former is primarily concerned to have an effect upon the individual offender but there are no inherent limits or constraints

on what form punishment might take nor how much of it there might be. Perhaps the only limit is that of having to keep the offender alive, for if punishment was so severe that it resulted in her death then she would be beyond deterrence. The common objection that could be lodged against both forms of deterrence is that they are 'overextensive to the extent of justifying ill-treatment by the state wherever this would result in a maximisation of utility'.<sup>10</sup> While it is not true that policies of deterrence *tout court* operate with a complete lack of regard for their effects upon the individual offender since punishment may be adjusted or adapted for individual offenders to obtain a 'maximisation of utility', it is the case that they treat the individual offender as a means to achieve a desired goal. The attainment of this goal does not recognise any obstacles in treating the offender this way. Are policies of reform any different?

Before embarking on this question, it is necessary to distinguish clearly two concepts that are often run together. Reform and rehabilitation are often treated as synonymous but they should be distinguished. It was only with the advent of criminological doctrines into the criminal justice system that the notion of 'rehabilitation' began to gain currency; prior to that, the dominant motif had been that of reform. It is clear that the increasing prominence of 'rehabilitation' was connected to the discoveries of criminology and its discrediting of the classical notion of the free will of the offender. Reform had been reliant upon this latter notion so that punishment was reformatory if it tried to incite the conscience of the offender into acknowledging her offence as an error, which she had committed out of



choice, so she could recognise it as such and renounce it. Criminology presented the offender as in some way the victim of circumstance, whether it be hereditary or psychological or environmental, so that it could not simply be left to the offender's free will to renounce her past deeds, since the offender's free will was not fully responsible for the occurrence of the offence in the first place. Rehabilitation seeks to adjust the circumstances which are adjudged to be beyond the control of the offender but were partly responsible (causally) for the offence so that the offender would find it easier not to re-offend. Since these circumstances vary according to the each offender, rehabilitation points toward individualised treatment for the offender. As reform is based upon the principle that free will, which every offender possesses, is the root cause of every crime, it will offer the same facilities for reform to all offenders.

Rehabilitation sidesteps what is a dilemma for reform, namely knowing if an apparent change in behaviour meant a genuine change of heart. Rehabilitation is not so concerned with moral conversions but changing the causal circumstances in which the offender had found himself. The offender may not have decided that morally it is better to live according to the law, but that the force of circumstances, which led him to commit an offence, are no longer operative .

Reform attempts to better a person's character so that she will be less likely to re-offend. It offers an offender the opportunity and context within a penal establishment to change his behaviour to that of a law-abiding person, through freely-reached convictions. The greatest difference between the two notions is that rehabilitation tries to modify circumstances beyond



the purview of the offender's will whereas reform tries to convince the offender that his or her breach of the law was wrong; the vehicle through which this effort of persuasion is attempted is punishment. One of the consequences of the difference between them is that 'reform is to be effected through punishment, whereas rehabilitation entails that reform accompanies punishment'.<sup>11</sup> I argued that there was a logical connection between reform and punishment but this is not the case with rehabilitation, so there is no need for it to be connected with unpleasant treatment and may be completely detached from it. According to rehabilitative criteria, treatment is only justified to the extent that it modifies the behaviour of the offender and so may veer between 'hard' and 'soft' options.

The above quotation indicates why it is so necessary to discriminate between reform and rehabilitation for the latter notion is far less at odds with deterrence than reform could ever be. The great problem that policies of reform always encountered was being simultaneously implemented with policies of deterrence which ensured that neither of them were observed satisfactorily; since rehabilitation can accompany punishment it is clear that it can also be distinguished from it. Thus there is not such an onus upon penal administrators to ensure punishment be dovetailed to meet reformatory and deterrent criteria as punishment can be composed mainly of the latter, doling out unpleasant treatment and rehabilitative policies can be invoked afterwards; this is not to say that this solution is stable- since rehabilitation slides between hard and soft options- or will satisfy those who wish to see more exclusively deterrent policies.

Rehabilitation eventually evoked a set of objections relating to the paternalistic and (potentially) arbitrary tyrannical position that it granted penal administrators vis-à-vis the prisoners under their charge. It seemed to licence many extreme forms of treatment such as electric shock therapy without any firm basis for a guarantee of success. It was not that rehabilitation was intrinsically threatening to the welfare of prisoners but that its basis for treatment was 'dangerously general and manipulable'.<sup>12</sup> Many different forms of treatment could be justified and implemented, ranging from group counselling to extreme measures such as the above. All this was backed up by various criminological doctrines which purported to explain criminal behaviour and offer treatment which would help to instil in offenders a certain standard of behaviour. Rehabilitation, depending on the circumstances, may assume the form either of what would normally be thought as policies of deterrence through the infliction of unpleasant consequences even though it may be justified along the paternalistic lines of 'to be cruel is to be kind'; or it may seem to embody the ultimate in seemingly soft treatment such as giving the offender a job. Even though rehabilitation may conflict with deterrence, this is not a matter of necessity; at times, they may be in harmony.

By distinguishing rehabilitation from reform, we have learnt a little more about the latter notion but have we gleaned any hints as to why it might be considered inconsistent with policies of deterrence? We understand that reform is characterised by efforts to persuade the offender that it is morally worthy to observe the law. Since this must be a freely-willed response,



otherwise there would be no point in offering reasons for consideration, coercion is ruled out. The inevitability of coercion was what especially characterised deterrence and also entailed the lack of any limits to this coercion (what was called its over-extensiveness). Reform, unlike rehabilitation, is limited by the responsiveness of the recipient of punishment. Though reform may not be successful in driving down the crime rate, it is impossible to force the offender into accepting that he or she should not break the law again and still maintain that this is reform.

This is where the incompatibility between reform and deterrence lies: not that the former treats the offender as an end-in-herself and the latter a means to achieve a socially-desired goal; reformatory policies could equally well be used in this manner if it was decided that they were the most apposite means to reduce crime. It is rather that the success of policies of deterrence are not dependent upon the offender in the same way that reformatory policies are. It is important to be careful about what is at issue here: the difference is often presumed to be that deterrence bypasses the consideration of the individual offender completely whilst reform consults the offender at every turn. However, this is not the case as we saw that individual deterrence cannot disregard the opinions and assessment of the offender completely; its success does depend on the offender considering the harms of punishment to outweigh any benefits of crime. Reform seeks a different route toward non-recidivism, through persuasion, which is a relationship which is difficult to classify as an exercise of power<sup>13</sup> since the person who is the focus of persuasion is free to reject any arguments



that are offered. If there is any effort to force the person concerned to accept the arguments, this spells a departure from the realm of freedom and onto the path towards force and compulsion.

Thus reform relies upon voluntary acceptance for its success, free from any hint of compulsion, whereas deterrence is based upon the attempt 'to establish in the mind of the power subject the future credibility of the power holder's willingness and capability to use force'.<sup>14</sup> Since any response is given in the light of this threat, it cannot be considered as voluntary but rather as non-voluntary since factors beyond the control of the individual directly influence his decision, which has always been at the heart of the incompatibility between reform and deterrence. As Wrong has recognised, 'there is an inherent incongruence in combining persuasive and moral appeals with the implicit threat, let alone the actual use, of force, which tends to neutralise the effectiveness of the former'.<sup>15</sup> Wrong supposes that this incongruence arises from the fact the 'persuasive power tends to be the least alienating...[and] the application of force is the most alienating'.<sup>16</sup> What Etzioni calls alienation, which we might term 'disaffection from a regime', arises because the wishes of the individual are overridden and he is given no possibility of participating in the respective regime. Thus the basic incompatibility springs from the fact that deterrence imposes a non-voluntary choice (I hope this does not seem too oxymoronic) and that reform relies upon the individual to make a genuine choice, having presented the best arguments to him. If the incompatibility between the two lies in the level of coercion applied, it follows that general deterrence will be in even

greater opposition toward reform since it can operate with complete disregard for the individual and indulge in greater punitiveness toward offenders. Thus deterrence *per se* is incompatible with reform because it necessarily implies coercion which excludes the possibility of reform.

This is what I will label a **necessary incompatibility**, necessary because the two are always elaborated with reference to each other, since the concept of punishment includes both, and incompatible because the implementation of one obstructs the observance of the other. Each element acts as a check on the possible extensiveness of the other so that it is impossible, for instance, to institute a policy of deterrence throughout the prison without it running up against reform. Furthermore since they are linked together, i.e. prison administrators have to confront this issue regardless of their own personal convictions, it does not require a group distinct from the prison administration for this issue to be confronted. This is not to say that such groups may not intervene, as they may be unhappy with the emphasis accorded to one or other of these ideas, but the necessary connection between the two ideas introduces a problem which cannot be ignored by those involved in the running of the prisons.

The influence of such a connected incompatibility will be such that the option of erasing the differences between the two ideas by offering a novel re-interpretation of each would seem the least problematical so that the situational logic could be said to be one of *compromise*. Of course, since such an influence is conditional, people are by no means bound to choose this option. They may well choose to adapt one idea to what is demanded



by another, so in this case by either accommodating reform to the demands of deterrence or vice-versa. Whether people are satisfied with such a resolution of the problem is a question only to be decided by empirical study, but it will chiefly be determined by whether the contradiction has been resolved. Rehabilitation might seem like a perfect compromise candidate since it can veer between 'hard' and 'soft' treatment but because this is so unstable, it may leave everyone unhappy. If the re-interpreted idea of reform still obstructs the operation of deterrence, then this effort at incorporation has proved unstable, and so the agents involved may choose to bring a novel interpretation of reform to the fore, or abandon the emphasis upon deterrence and seek to tailor this idea to the contours of reform or it may be thought that the only way to proceed is to amalgamate the two ideas by stripping each of their most obviously incompatible elements.

None of these shelters from the storm are impervious to the weather, but the question posed is why periods of quiet lasted for the time they did and why such relative peace abated. Just because we are looking at the evolution of ideas, this does not mean that all change can be attributed to intellectual disquiet alone. Even though the rain is seeping in, it may be resolutely ignored or someone may seek to plug the leak. People are not so intellectually fastidious that at the first sign of trouble they abandon previously held convictions. People shift positions and replace beliefs because they are no longer suitable to the task at hand and the imperative to come up with more adequate answers has become more pressing. After the prison authorities had decided to operate a more deterrent regime, problems arose



as to the place of reform (ill-treatment of prisoners) within the prison service. Yet some were content to come up with *ad hoc* solutions, until they were compelled to deal with the problem in a more comprehensive way. So, the exercise of power is an important variable in explanations of cultural development, but this is not to say that the development of knowledge can be related to power alone. The chief concern of this work is with how the combined effect of two inconsistent ideas has a causal influence upon how agents act. I have made it clear that though the situational logic may incline those involved into declaring a truce and working toward a lasting peace, some may prefer to remain closely allied to one idea or another and seek to subdue its opposite. The interesting question is how people buck the trend, how they maintain a degree of social order despite the fact that they are presiding over implacably opposed elements.

Since I am dealing with a relatively recent historical period any notions of primitive mentality have to be jettisoned or else it has to be admitted that people from hugely variant cultures have a similar degree of contradiction-tolerance, so dissolving the comparative element within the notion of a primitive mentality. People may be unaware of the implications of the ideas with which they are working, which does nothing to lessen the actual incompatibility involved and only gradually does it become clear to them. This will be seen to be the case in the period following the construction of the first national penitentiary as it became clearer what reform actually entailed, namely a concern for the individual and a care not to injure permanently his faculties. When national penitentiaries were first

established, those in charge of running them were aware of the problems of reconciling deterrence and reform but seemed to hope that these could be ironed out in the daily administration of the first prison. This failure to attend to the problem at the intellectual level meant the incompatibility between ideas manifested itself as continual strain and divisiveness between different departments, each trying to carry out one portion of what constituted penal punishment and practical hypocrisy on the part of staff as they tried to exhibit two different demeanours whilst on the job. This is how incompatibility between parts can manifest itself at the social level, frustrating the activities of agents and presenting them with irreconcilable diktats through informing the roles they fill.

Though some people may be aware of the contradiction this does not ensure that all interested parties are; even if people are aware of an inconsistency unless it actually impinges upon their perceived interests they may well treat it as peripheral to their concerns. What must first be assessed is the social relevance of the issue at hand, for it is only if people believe their positions are being subject to antagonistic scrutiny will they bother making an effort to conceal the inherent inconsistencies. Then it is the extent of the resources which a group can devote to covering up the inconsistency that will indicate how successful they will be in maintaining their subterfuge, initially at least; this is not to assume that those who possess a greater degree of power will always prevail for the more successful the exercise of power is in the short-term, this results in inciting



an even more intense desire to escape from its yoke on the part of those who are subject to it.

Thus, in the second period which I shall be investigating, 1865-95, the characterisation of it as a dark age of repression and deterrence during which an extremely powerful prison executive was able to impose a severe regime upon prison inmates through a policy of exclusion and repression fails to note how this works against the prison administrators in the long-run. While cultural stability in the social sphere can be attributed to the use of power for some length of time, such orderliness cannot be guaranteed by the use of power forever. Indeed in the long run the machinations of power will probably work against those who have set their shoulders against the situational logic, precisely because they have bent their efforts in order to give undue weight to one of the two ideas involved. For instance, those on the receiving end looked to escape the rigours of the deterrent regime and so sought intellectual justification for their claims to special status such as the Irish political prisoners who claimed that they should not be treated as common criminals, so contributing to cultural elaboration.

I have so far only mentioned one possible logical relationship among ideas, that of a necessary incompatibility. Whilst the effects of this will be my main focus of concern, there are other important ideational relationships which should not be neglected. An obvious question to be asked is how, if punishment within prisons was such an internally divisive project, did it ever get off the ground? Did even those who agreed on the need for penal punishment agree on a single method to achieve this end or did they have



differing opinions? Those ideas which are logically opposed to one another but are in no way connected with each other I will term a **competitive contradiction**. The competitive contradiction differs from the necessary incompatibility as it needs to be activated by social actors since it is a scenario where the opposite of some idea is in no way implicated by it.

I will show that those who were most zealously promoting the case of reform favoured a means of punishment known as the separate system, entailing isolation, which was incompatible with the silent system, admitting association. Here we have a different kind of situational logic at work: no longer is it advantageous to bury the hatchet with one's opponents, rather it is better to attack him with it. Alliances are out, assaults are in so that the logic is one of *elimination*. One no longer seeks to discard what is most distinctive about one's own idea, indeed these are virtues to be trumpeted and laudably compared to the opposing idea's supposed deficiencies. Each side will latch onto the other's theoretical weaknesses and declare this to be a sign of its obsolescence, which in turn only encourages the other to instigate running repairs and emerge once more into the fray. It may well be that like two fighters who began circling each other warily, making a thrust here, a feint there, end up tangling in the dust to such an extent that they are virtually indistinguishable to onlookers, no longer knowing for whom they should cheer. Distinctions become so refined and abstruse so that the uninitiated cannot see what all the fuss is about. Unless all the relevant populace is divided into two strictly partisan groups, many of the uncommitted may opt to split the difference and come up with a working

approximation to both, simply because the flaws and virtues of both have been broadcast so extensively that it is difficult to align oneself with one system.

Again it is a matter of investigating which group is in the more powerful position to see how it all pans out. This is not to treat the theoretical debates to the role of shadow-boxing, incidental to the hurly-burly of social life since the advocates of the separate system, though able to pull the levers of the political machinery and so impose their will on those gaolers less enthusiastic than them, still had to take account of criticism with the result being that the separate system was very rarely installed in an unadulterated form. The above does nothing to answer the question as to how, if the penal debate was wracked by such divisions, did it ever get off the ground; from where did it draw support? It is time to consider another set of logical relationships, those of complementarity and see whether idea of punishment benefited from any of these. The first notion of complementarity which I will examine is where two complementary ideas can be said to be necessarily connected or they can be brought together by people sensing some potential benefits from such a union.

This I will term a **necessary complementarity**: those who were promoting the cause of penal institutions drew ideological support from the idea that for legal punishment to be legitimate, its exercise must be uniform throughout the land and the only agency which could decide upon a such a uniform punishment was the state legislature. Punishment is not necessarily connected with justice but since we are talking about legal punishment, this



means that its adjudication and application must be without favour or disparity. Therefore the local prisons had to fall into line with what central government decreed since only its mode of punishment could be labelled just. Once this connection had been accepted, further implications were discovered: greater economy and efficiency would occur once there was uniformity in the practice of punishment. Thus the situational logic induces one to establish further linkages between the ideas since their combination seems so promising, initially at least. The logic of this particular relationship of ideas may be said to be one of *fortification* as the relationship is built up which is simultaneously a way of warding off disruptive innovations.

The two ideas become linked together in a process of increasing complexity as more and more implications come to light, and brought within the purview of the original complementarity. The end result is a settled system of knowledge and beliefs as the once rich seam of compatible items has been extensively mined and such density precludes the addition of any significant new items as this would upset the carefully constructed edifice of ideas. As Kuhn notes the paradigm 'suppresses fundamental novelties because they are necessarily subversive of its basic commitments'.<sup>17</sup> Innovations, once a source of delight now become a locus of disquiet. Very often, the results of the complementarity will be presented as the natural order of things and alternative ideas spurned as aberrations. The implications of criminology were originally castigated as such, unacceptable to all right-thinking people.



Criminology represents the last kind of logical relationship which I will address: it is one whereby two ideas, whose mutual 'fit' is not immediately apparent but can be conjoined without contradiction, are brought into connection because some agents are dissatisfied with the prevailing state of affairs as it brings little benefit; this relationship between ideas I will label a **contingent complementarity**. An analogy could be drawn with Kuhn's picture of normal science which ushers in few novel developments but can only offer solutions to problems of a mundane nature, all the time ignoring the anomalies it cannot solve and spurning the opportunities which would disrupt certain benefits for the sake of unknown advantages.

Eventually, some build on what has gone before but strike off in a new direction unhindered by any attachment to the old order and usually threatening (not always intentionally) to pull down some of the theoretical pillars which had buttressed it. An example of this would be the development of criminology which was thought to secure a greater knowledge of criminal behaviour by outlining environmental and genetic factors which contributed to crime, and so punishment allied to the expertise of criminology could be made more precise and efficient.

The logic of drawing previously unconnected elements together is that as not all are working on such a project, it will be restricted to a few as the connection becomes increasingly complex. People will hive off into small groups fascinated by what can be gleaned from such novel associations. What is important to note is the effect of such specialisation upon the overall context in which people are working. Similarly, the specialisation

which criminology introduced called into question many of the previously held connections between punishment and justice, such as the assumption of full responsibility for one's crime, equal sentences for the same crime. Since the prevailing logic was one of tightly-bound systematisation, introducing a degree of specialisation was bound to have disturbing repercussions. But ideational diversification does not automatically entail social conflict, especially since the ideas in question are not antithetical, but it does increase the problems of maintaining a previously-dominant consensus.

The development of knowledge connected with the contingent complementarities will be rapid at first, as there is apparently boundless territory to explore, some of which in hindsight will prove unsuitable for habitation, i.e. an idea that was endorsed may be discarded as a more careful scan reveals its deficiencies. The situational logic is one of *opportunity* as each research group sets out into uncharted territory to prove the validity of their own findings. What may not be apparent to the first pioneers is how many of the assumptions which are predicated upon a contingent complementarity are incompatible; that in seeking to prove their own assumptions others have been ruled out. This will not be anathema to variety but will be a blessing to it since absolute refutations will be hard to come by. Thus what will usually be the normal situation for the contingent complementarity will be a proliferation of competing explanations some of which will be confronting and complementing each other.



Figure 2

Cultural Framework		Situational Logic	
Necessary Incompatibility	-----	Compromise	
Competitive Contradiction	-----	Elimination	
Necessary Complementarity	-----	Fortification	
Contingent Complementarity	-----	Opportunity	

[Adapted from Archer, 1995, Fig.13, p.218]

There is little point in developing the abstractions unless it can be an aid in actual research and can be shown to be such a boon. To this end, armed with the above framework, I will investigate penal developments in England and Wales from the establishment of the first state penitentiary to demonstrate that analytical dualism can illuminate historical events and include what had to be passed over by the power/ knowledge school. In so doing I will fill out the ideas sketched above. I will trace the fate of the idea of punishment, straddled as it was between reform and deterrence, and the dilemmas that were posed by its being composed of two incompatible elements and the different strategies that were developed to cope with the influence of a necessary contradiction. I have chosen a wide time-frame within which to conduct my investigation, from the 1820s to the 1920s.

This time span will allow me to demonstrate that the problem of reform and deterrence has been with British penal authorities since the inception of the first prison and not simply after the findings of the Gladstone committee. Many have believed this as a result of the second period when deterrence was accentuated but this ignores the tactics undertaken to conceal the omission of deterrence. The necessary incompatibility between reform and deterrence is the keystone of this study and its absence from much of the Foucauldian school explains why their thesis has gained such influence. To



refute it, I have had to show it has always been a concern for penal authorities and that the two ideas should never be considered in isolation.

I will also make reference to the other cultural frameworks showing how they impacted upon penal problems as it would be rare that only one framework was active in its influence. I will try to show how the development of criminology affected the balance between deterrence and reform and how the tension between it and classical justice were resolved. If I can convince my readers that the power/ knowledge approach is inapplicable in the area where its benefits have been most vaunted then this will go a long way to demonstrating that the clasping together of power and knowledge represents a blind alley for social theory and that those seeking an explanation for the development of prisons and the alternatives to it should look elsewhere rather than seeking clues in the power/knowledge approach.

### 3. The Expansion of Reform

In this chapter I will trace the development of both the ideas of punishment and their reception and effects within the newly established prisons. I will show how the uncertainty that surrounded this new venture contributed to the belief that both reform and deterrence could be fully observed without amendment of either but this effort resulted in obstacles to the administration of prisons and practical frustrations for staff. After this was realised there was a shift of emphasis towards reform as more elaborate procedures were adopted to coax, not coerce, a change of disposition, from criminal to law-abiding.

Even though there was agreement that prominence should be lent to reformatory efforts, this did not entail unanimity on the best means to achieve this end. I will show how there was an extremely virulent debate over the model necessary for prison reform and this dispels any assumption about monism at the level of ideas so undercutting the power/knowledge approach. As people developed ideas to advance their own beliefs this only instigated efforts by others to come up with alternatives to refute the option they opposed. I said earlier that the scenario of knowledge that best fitted with the assumptions of the power/knowledge approach was when two ideas mutually invoke each other creating a linkage that no-one is able to deny. Such a scenario existed between the ideas of punishment and justice which proved to be a powerful weapon for those who argued for uniformity of punishment throughout all prisons as they could argue that it was of the

very nature of punishment that it should be applied without variation to all within the relevant boundaries. Even here there is no automatic connection between the ideational scenario and the bestowal of power, as I will show. Finally in this chapter I will examine how the emphasis upon reform was tilted back in favour of deterrence and suggest why reform held sway for the time it did.

### **3.1 The establishment of government penal institutions**

On what basis did punishment rest in the 18th century? There was little of the intermediate punishments that were to proliferate in the following century. For the serious crimes there was usually the choice between death by execution and transportation to one of the colonies. Prisons were usually reserved for debtors, minor offenders and those who were either awaiting trial, execution or transportation. It has been estimated that by the late 1760s nearly 70% of all sentences at the Old Bailey were terms of transportation and the majority of these were consigned to the American colonies.<sup>1</sup> How then did the government react to the crisis in penal arrangements precipitated by the American revolution which foreclosed the chief receptacle for offenders?

The first response was one of procrastination as the authorities temporised by placing the prisoners either in the hulks or else transferring them to the local gaols. This may have been because they expected normal service to be resumed as soon as the colonies were defeated but when this failed to occur, the dilemma over what should be done with the convicts



remained. The jails were filling up and even though more severe punishments were being put in place, their effectiveness was in doubt. A colony was again sought that could take Britain's criminals and Australia was selected. Interestingly though some were glad of the relief that it offered, others were beginning to establish the links between punishment and justice, which would call into question the equity of a punishment like transportation that inflicted uncertain and unseen punishments.

The American revolution negated the prior set of arrangements which were relatively beneficial to the government since they were a cheap way of disposing of the criminals. It is no surprise that there was a delay in selecting another means to dispose of offenders while the possibility remained that transportation to America could resume. Whilst the government was trying to maintain social order many, inspired by Howard's tract *The State of the Prisons*, began to scrutinise the workings of the prison more closely. Most of these came from a deeply religious background and were discomfited by the lack of opportunity given to the prisoner so that he might repent of his sins. They believed that all men were sinners and that God's grace extended to the lowliest. There was another school of thought which, though coming at the problem from a different angle, came to some of the same conclusions. This was the rationalist philosophy, represented by Bentham, which stressed that people had committed crime as the result of misguided calculations about pleasure and argued that they could be trained to reason correctly, the result being that he would commit crime no more.

The religious school of thought was more numerous than the rationalist and they introduced the very Protestant notion of conscience into talk of reclaiming the prisoner: how could his conscience be awakened so that he would recognise the rectitude of social laws and the legitimacy of punishment? The breakthrough made by these reformers was not that they were the 'first to see that punishment could only arouse guilt if it did not alienate the offender or the public. But they were the first to argue that criminals actually had a capacity for remorse, which could be awakened by carefully legitimated and scientifically inflicted pain'.<sup>2</sup> Only if the prisons were purged of abusive conditions and unjustified punishments could the conscience of the criminal be stirred.

The spectacle of wrongdoers being executed for ever more modest infractions, as the government sought to maintain social order as a recession set in after the American market was closed to British producers, convinced the reformers of the inequity and hence the inefficiency of the present state of punishments. The return of transportation did nothing to allay their concerns and in fact they were worried that prisoners might lose their chance of reform. Thanks to the reforms drawing attention of the need for systematic connections between punishment and justice, others now began to question the equity of transportation since it seemed to be something of a lottery whether people would suffer or prosper during their sentence.

Though transportation had resumed the reformers had made their influence felt through the introduction of a bill in 1778 which encompassed a regime of solitary imprisonment, accompanied by 'well-regulated labour, and religious



instruction .... [which] might be the Means, under Providence, not only of deterring others from the Commission of...Crimes but also of Reforming the Individuals and inuring them to the habits of Industry'.<sup>3</sup> The hope that two such distinct ideals could be reconciled was never tested under the auspices of this bill, enacted as the Penitentiary Act. Funds were unforthcoming as transportation to the colonies was thought to be the less expensive option, the hulks being used as a preliminary to this. There were also constitutional objections to the government becoming involved in county matters, objections which the justices had raised at Westminster.

Though it was 1810 before the possibility of a penitentiary was mooted again there had been considerable development in the local prisons. Some were intended for custodial purposes with little thought given to reformatory work, such as Horsham in Sussex. The Gloucester magistrates followed the principles of the above Act in establishing a prison. The regime was to be such as to 'produce Reflection; the Food such as will support Life, and preserve Health, but by no means animate the spirits. Dejection and Solitude are the natural Parents of Reflection'.<sup>4</sup> The prisoner was to be furnished with nothing which could lead to distraction, so inducing them to reflect on their past deeds. It was believed that a spartan regime such as this abided by the principles of reform - the prisoner would realise the error of his ways - and deterrence - the jail would possess few comforts so that it would not attract the destitute. Since punishment was of the mind rather than the body, labour occupied a minor role, generally allowed as a reward, rather than a penalty.



In 1810, an House of Commons select committee was appointed to investigate what form penal institutions might take. Evidence was taken on the prison regime at Gloucester and the house of correction at Southwell. The latter, receiving prisoners who generally had short sentences to serve, was less concerned to achieve a change of heart than of habit. Labour was an important means to this end, as prisoners were able to keep a portion of the profit from their labour. Solitude was invoked as a corrective, but it was in association with fellow-prisoners that the inmate was 'expected, under proper management to form habits of industry and self-interest, which he will be likely to practise on his return to society'.<sup>5</sup>

There were similarities between this regime and that proposed by Jeremy Bentham, perhaps the chief difference lying in importance placed on the design of the prison (the infamous Panopticon), which possessed the advantage that prisoners would never know when they were being surveyed or not; they would be in a perpetual state of indecision and torment since their every move might be observed.

There arose conflicts over how the prisons were to be run. Bentham believed that the governor should have the largest say, explicitly disassociating himself from the trust-management model envisaged in the Penitentiary Act, which entrusted a committee with powers to hire and dismiss staff and inspect prisoners. Bentham believed that the governor would run the prison well since he had a financial stake in doing so and this, coupled with inspection by magistrates and visits by the public, would prevent systematic abuse. The committee members were apprehensive that

‘under a system, in which pecuniary advantage is made the most prominent object of attention, the experiment of reformation would not be fairly tried’.<sup>6</sup>

More particularly, they did not feel that there were proper institutional safeguards to protect the interests of the prisoners. According to Bentham, the chaplain and surgeon would be employees of the governor but the committee argued that

to make these officers of real use in this particular [the prevention of abuses] they must occasionally confer with the prisoner without the presence of the governor or his servants; they must neither be under strong obligations to the Governor, or subject to his power; and they must be in habits of communicating with persons armed with sufficient authority to punish or redress the grievances laid before them.<sup>7</sup>

The Holford Committee attempted to steer a middle course between the differing courses of action proposed to them. They created a system of checks and balances within the prison and also devised a regime which tried to embrace the virtues of Gloucester and Southwell. The newly arrived prisoners endured a period of solitude before being permitted to move on to associated labour. Is this not an attempt at syncretism, not a favouring of reform over deterrence? But as McConville notes ‘there was [a] fundamental incompatibility in the philosophies and objectives directing the respective regimes of Gloucester Penitentiary and the Southwell house of correction, the depth of which the Holford Committee failed to appreciate. Consequently the rashly devised administration of Millbank could blame its hybrid origin for



the incurable stresses that hampered the efforts and contributed to the ultimate failure of the penitentiary'.<sup>8</sup>

Deployment of cultural power is not always an explanation for the lack of divisiveness within a population despite the presence of incompatibilities in the world of ideas. It is even too large a step to attribute this to people unaware or uninterested in what is going on. People may be unsure how events will unfold and bide their time before committing themselves one way or the other. In 1774 at Gloucester prison, Paul the governor, had tried to assuage those doubting that 'terror' and 'humanity' could be combined and people were similarly undecided over the regime at Millbank. Griffiths wrote fifty years later that the proceedings of the committee 'were more or less tentative, for as yet little was known of so-called prison discipline, and those who had taken Millbank under their charge were compelled to feel their way slowly and with caution, as men still in the dark'.<sup>9</sup> The fact that people were ignorant of the contradictory nature of these ideas does not imply that their influence is lessened in any way; their effect will often be experienced as severe precisely because it is unexpected.

Millbank in some respects operated a less severe regime than other gaols: corporal punishment was not used for the first eleven years, in contrast to all other gaols and its diet was relatively plentiful. The diet in prisons was always susceptible to attack for being too luxurious and offensive to requirements of less-eligibility, that criminals should not enjoy a better standard of living than the worst-off ordinary person, a notion from which the case for a severely deterrent regime drew much of its support. Holford



himself admitted that to many 'the luxury of the Penitentiary was a standing joke. The prison was called my fattening house'.<sup>10</sup> Consequently the diet was reduced only for this reduction to be followed by a scurvy epidemic which resulted in thirty deaths. This illustrates the lack of certainty as to how the prisoners should be treated: the authorities were aiming at an equilibrium between deterrence and reform, but their efforts only showed how wide of the mark they were.

The same lack of certainty was apparent in the administrative arrangements: the committee members involved themselves closely in the running of the prison and the first governor complained that he had little latitude. Griffiths believes that this was due to the fact that the committee believed that 'it was necessary to see from time to time how the rules first framed worked in practice, and what customs that grew up should be prohibited, and what sanctioned, by the committee, and adopted into the rules'.<sup>11</sup> Undoubtedly close supervision will attend the running of any establishment in its first few years but such control was exacerbated by the perceived need to ensure that there were no abuses of power. After the first governor aired his grievances before a select committee, there were no further recordings of excessive intervention.

The inconsistent demands placed upon the staff at Millbank manifested themselves in the conflicts between the chaplain and governor. It was hoped that each would be supreme in his own department but this turned out to be a forlorn hope. The management committee abolished the remission of sentences in 1830, despite it being an effective disciplinary tool, as it was

believed that it constituted an incitement to hypocrisy. The reformatory beliefs were fully evident in their decision to amalgamate the two offices of chaplain and governor, hoping to 'put an end to the collision which has so frequently occurred between the rival departments'.<sup>12</sup> Only by recourse to this could 'vigour and unity' be imparted to the whole system and the obstacles to reformatory discipline and religion overcome. The Home Secretary of the day succinctly stated the problem: the strict enforcement of discipline in a prison is a duty hardly to be reconciled with the consoling and charitable offices of a minister of religion.

In a prison, the necessity of treating the inmates brusquely and with less than full consideration of their dignity is almost inescapable but with the accession of the chaplain to the newly-combined post, increasing emphasis was put upon reformation. The prison staff were expected to participate fully in the attempts to reclaim the consciences of the prisoners, to be 'mild yet firm'. The effects of a necessary incompatibility become apparent: a practical synthesis which promotes hypocrisy. Some of the staff took to carrying bibles and even the prisoners put on a show of holiness. If the staff were suspected of less than uprighteous conduct (i.e. profane language) they ran the danger of being dismissed. No attempt was made to offer a re-interpretation of deterrence which might have jarred less with the obviously reformatory demands of the Millbank regime; this points to the inherently unstable nature of any such practical rapprochement and the demands it places upon the conduct of individuals who have to try to reconcile the two opposed injunctions.



Doubts over the effectiveness of the reformatory methods practised by Rev. Nihill (concerning the separate system with which I shall deal later) led many to question the usefulness of Millbank and conclude that it was neither deterring criminals nor contributing to the reform of prisoners. It was decided that its function as a penitentiary should be discontinued and that it should be utilised as a depot for prisoners awaiting transportation. Such disenchantment did not signal the end of government involvement with the prisons for an Act was passed in 1815 prohibiting gaolers taking fees from prisoners; this undercut their independence and encouraged magistrates to take more of an interest since the upkeep of the prisons would be met out of public funds. Peel's Gaol Act of 1823 was partly a result of lobbying by the *Society for the Improvement of Prison Discipline* for changes according to reformatory principles, though it would be criticised for not providing 'any machinery for compelling negligent or recalcitrant local authorities to comply with its requirements',<sup>13</sup> a complaint which eventually resulted in the establishment of a prison inspectorate.

The main lesson to be drawn from the experiences of Millbank is that people may not be aware of the implications of the ideas they endorse, and this lack of knowledge may lead them to overestimate how easily they can be moulded together. When their effect begins to be felt, people have a choice of either soldiering on in an *ad hoc* manner or else trying to combine the opposed ideas in a novel way in an effort to less the contradictions. How soon this latter course is opted for depends, I believe, on two factors: how committed are those whose task it is to oversee the



operation of these policies to one or other of these ideas and so would shrink from any dilution of their efficacy, and how influential are those on whom the brunt of the contradiction falls. The prison staff would undoubtedly liked to have seen some reformulation of penal policies, as evidenced by the great number leaving the service, but lacked the power to instigate such a change.

The problems associated with Millbank did not disappear or fundamentally differ as the prison service expanded and government control grew. There is a tendency to equate the happenings and influence of social structure with events at a macro-level and since I have designated culture as the ideational equivalent to structure in the material realm, there may be a temptation to believe that cultural problems occur on a similarly large-scale. This inference is unwarranted and the causal influence of ideas does not vary much depending on where the ideas are instantiated, be it in one single prison such as Millbank which could be classified as a micro-situation or throughout an entire system of institutions (a macro-situation). In the third period I shall be examining, I will show that the same problems of the correct mixture of reform and deterrence obtained with respect to the Borstals, the prisons for juveniles. This is not to say that various structural influences do not have an effect on how ideas enter into social life, but to admit that the influence of ideas can seep into all areas of social life, be they small or large-scale. I will now try to show that as the prison service grew in complexity, the problem of reconciling deterrence and reform remained as troublesome and pressing as before.

### 3.2 Competing models of confinement

The authorities at Millbank were obviously unsure as to the best method of dealing with prisoners. It was a commonplace belief that gathering prisoners together only led to moral contamination, a conviction which a Select Committee strengthened by demanding a stricter seclusion of prisoners be established. But what was one to do about the practise of associated labour, since it seemed to undo the reform brought about by separating the prisoners? A commissioner was despatched to the United States in order to investigate American modes of discipline, the two most prominent being known as the separate and silent system. The former was based upon isolating prisoners from each other as it was believed that moral contagion of prisoners would occur if they associated with each other. The latter system was based upon prisoners working in association with each other, but in silence so that no plans could be hatched amongst the prisoners; this was believed to be a more natural state of affairs

The commissioner Crawford seems to have chosen to have put the silent system to the sword before anyone could adopt it, though this may have been because it approximated more closely to current conditions in many local prisons than the separate system. His pre-emptive strike contains many of the features that would re-occur in debates through the years concerning the relative merits of both systems. He extolled

the benefits of the separate system as being not only an exemplary punishment, but a powerful agent in the reformation of

morals. It inevitably tends to arrest the progress of corruption. In the silence of the cell contamination cannot be received or imparted. A sense of degradation cannot be excited by exposure, not reformation checked by false shame. Day after day, with no companion but his thoughts, the convict is compelled to reflect, and listen to the reproof of conscience. He is to reflect on past errors, and to cherish whatever better feelings he may have imbibed. These circumstances are in the highest degree calculated to ameliorate the affections and reclaim the heart.<sup>14</sup>

He was equally expansive in his denunciations of the 'silent system', noting that it encouraged abuses, since men placed in association were bound to communicate in some fashion or other and would have to be punished, perhaps excessively: 'the whip inflicts immediate pain, but solitude inspires permanent terror. The former degrades while it humiliates; the latter subdues but does not debase'.<sup>15</sup>

Crawford soon secured a position from which to advance his beliefs, that of the inspector of prison of England along with another convinced proponent of the separate system, Whitworth Russell, an ex-chaplain of Millbank. This inspectorate was conceived to be necessary, following a House of Lords Select Committee finding that 'entire separation... is absolutely necessary for preventing contamination, and for securing a proper system of prison discipline'.<sup>16</sup>

Invested with the power of inspection they were able to publicise what they perceived was a shocking disparity between the 'principles of justice



and policy' and contemporary conditions in the prisons: 'the law enacts for the same crime the same penalty; whereas, the penalty varies according to the prison in which it is inflicted'. The separate system had the 'capacity of being administered with exact uniformity in every prison, unaffected by the diversity of character and disposition which must be expected in the keepers and subordinate officers of the various establishments'<sup>17</sup> unlike the silent whose administration depended upon the quality of staff. The tactic is familiar: developing an ideology to buttress its own claims (justice and right are on their side), while at the same time undercutting their rivals' legitimacy (punishment being merely local, it contravenes the associated principle of justice). Having seized the political high ground, the inspectorate now began to march towards the moral. But it was not enough for the government inspectorate to inveigh against the errors of alternative programs of punishment, they had to provide a viable substitute; monopoly of legislative machinery enabled the inspectorate to put forward restrictive policies which would weed out those prison regimes which were deemed undesirable, yet something had to put in their place. Might does not equal right but it can go some way towards convincing ones' opponents of the desirability of abandoning their position; this is a product of coercion rather than conviction and will not do anything to induce them to erect anything in place of the discarded project. Hence the separate system had to be promoted on its own merits.

The realisation that there existed an alternative model not only induced the inspectors to detail how the separate system contained all the requisites

of a 'proper and efficient system of prison discipline', but also to rescue their project from any possible misunderstandings; a stratagem which can be likened to an inspection of one's defences, prior to an expected attack, to strengthen those areas which may be targeted. They wrote that 'they are anxious to guard against a very general mistake, by which separate confinement has been inadvertently confounded with solitary confinement'; an error since the one differs from the other both 'in its *nature* and in its *design*' (italics in original). Solitary confinement approximates closely to 'unmitigated, uninterrupted seclusion from human society' whereas separation merely cuts the inmate off from deleterious influences but allows him regular contact with prison staff and secures for him religious services and education. Thus it is intended for the moral benefit of the prisoner whereas solitary confinement is meant purely as punishment. They admit that they 'have gone into the discriminating features at a length and with a minuteness of detail, which the mistakes and misrepresentations that have been made on this subject have rendered absolutely necessary'.<sup>18</sup> Thus it was only due to the spur of competition that they have felt compelled to elaborate, not from any pressing intellectual disquiet.

At the end of their report they called for the establishment of a prison upon the model of the separate system, which would be an example to every other mode of imprisonment. It would also put the system to its 'severest test', a request which was realised with the construction of Pentonville Prison, which was to demonstrate to local justices the superiority



of the separate system, but it was as much an experiment as a finished model.

But was there anybody to pick up the challenge, to further the debate? And if there was, how did they react to the criticisms of the silent system? The opposition was centred around Middlesex with the magistrate Peter Laurie and the governor of Cold Bath, G.L. Chesterton, among the most prominent opponents. Predictably they attacked what was thought to be the most vulnerable part of the separate system, namely its potentially detrimental effects upon the mental health of inmates. Laurie was scathing of the justifications offered for these occurrences at Pentonville, namely that those rendered insane suffered from latent insanity prior to imprisonment, and scornfully remarked that either the system was designed to incite latent insanity or else it had, among prisons, a monopoly of all cases of hereditary insanity. He was alert to the way that competitors would cobble together any old excuse, not so much in the belief that it would be sufficient, but to buy some time until they could devise a more adequate defence: 'every excuse and device, however flimsy, was pressed into service, at any risk of inconsistency to palliate these disastrous results'.<sup>19</sup> Returning to the fray two years later, he doubted whether the system at Pentonville was applicable throughout the country since its inmates were drawn from a specially selected class of prisoners, the weak and feeble being rejected, a procedure which could not be duplicated at all prisons. He again displays how a tussle of competitive ideas induces people to seek out the weakest part of the opposing idea and exploit it to the full. He showed that from the



prison's own records deaths per year were at the rate of 14 in every thousand, but this was reasonable, it was claimed, since average male mortality was at a rate of 13.35 per 1000. But 'to compare selected cases free all taint of disorder, under the constant care of a Resident Surgeon, with a general population' was 'proof of the desperate shifts to which these noble and medical Commissioners are driven in support of an untenable position'.<sup>20</sup> There may always be those who appear ridiculous, who gain the label of an extremist, to preserve their position. They also cast doubt upon what they perceived as the exaggerated hopes of reform of the separate system, and the futility of isolating prisoners from each other, to prevent recognition when they were to be released from prison. The great expense of constructing prisons in accordance with the separate system was also noted.

How were such objections met? On the question of economy it was noted that the silent system necessitated an expansion in the number of prisoners employed, defeating the principle of economy, or else prisoners would have to be employed, rewarding those who were supposed to be punished. However Nihill conceded that within the separate system there was no 'trial of social of social qualities and so no discipline of temper as arising out of ordinary intercourse of life'<sup>21</sup>; that the separate system was artificial in cutting prisoners off from habitual social intercourse and left the prisoner unprepared for life after his or her prison sentence was to be acknowledged as one of its failings. But simply because defects were recognised does not mean that they were seen as fatal to the establishment of certain preferred options. Nihill was well aware that the separate system

must tend to produce insanity but argued that morals were no less a consideration than health. McConville notes that this outlook showed 'astonishing single-mindedness and political naiveté and it is hardly surprising that he was unable to persuade the committee to maintain the new regime [at Millbank]'.<sup>22</sup> As above, there may always be some supporters who cling desperately to their beliefs by simply shrugging off attacks and not coming up with any adequate refutations; such a tactic will not, however, win over the doubters and so marks the appearance of degeneracy within the body of ideas, which is not to say decline is inevitable but that its expansion has been checked.

When a consequence can be labelled extreme and the label made to stick, this marks the beginning of the outline of a more modest program, as people are aware of what should not be entailed by any set of ideas. Thus those who ran penal affairs recognised that unmitigated intercourse between prisoners was damaging to their morals, so that it had to be checked in some way, but that separation was damaging to the health of the prisoners if extended over to long a period of time.

Chesterton was an advocate of the silent system who recognised the force of the objections levelled at it. He admitted that the silent system was not one that recommended 'itself to universal adoption in Great Britain'<sup>23</sup> but he still wished to deal some blows to the separate system. Like many who wish to see their rivals vanquished, the temptation is to produce what seems like a decisive result; so his opponents asserted that 'the separate system ... is productive of all the benefits which the most earnest and



sanguine advocates of prison discipline have ever ventured to hope for'. Chesterton caustically commented that 'affirmations to this effect, of the most positive kind abound' and then proceeded to show that 'all this inflated pretension is disprovable'.<sup>24</sup>

And even though some points may be conceded, that does not mean that the game is up: on the question of communication, he argued much of it was peculiar to one group so that the 'uninitiated were ignorant of the import of their signs, and safe from contaminating signs'.<sup>25</sup> He allowed that punishment was perhaps excessive but believed it to be 'a very great benefit' since many had been subject to it before, and having perceived how useless it was to maintain resistance they became 'penitent and submissive'.<sup>26</sup> But Chesterton was fighting a rearguard action, as when he was asked whether he had ever contemplated 'the possibility of a combination of the systems', he replied that 'it would be desirable to combine the system',<sup>27</sup> an inescapable conclusion once he had admitted separation for a short period might be beneficial.

These arguments had been presented to the Select Committee on Prison Discipline in 1850 and it had to make recommendations on the basis of them. Unsurprisingly they opted for a compromise between the two modes of prison discipline, so that all prisoners should serve three months, and that prisoners under long sentences should not have separation enforced for longer than twelve months. Following this, 'the remainder of their sentences ought to be passed under a system of combined labour, with effectual precautions against intercourse'.<sup>28</sup>



Though the separate system had been lauded for its capacity to combine both deterrence and reform, its deterrent qualities could only be pushed so far before unhinging the prisoners' minds; and the fear that it created an artificial environment, that it 'separates a man from all his usual habits and conditions, and so entirely takes from him all the responsibility of his own actions, rendering it almost impossible for him to do wrong', left it susceptible to criticism. Chersterton elaborated that 'the prisoner is not exposed to any temptation; his character is not tested; the only virtue which he is called upon to exercise is patience; he must endure but there is no conflict'.<sup>29</sup> The recognition of the defects of the separate system and the subsequent combination of the two penal systems meant that prison discipline was to develop in an explicitly reformatory direction.

But how extensive were these debates or was it confined to a coterie? Though the inspectorate only gradually accumulated executive powers, their ability to chide and chastise spurred many local authorities to rectify deficiencies; this meant little if the local authorities were determined not to embark on costly alterations, which were as yet unproven. As the rationale behind the changes was that all prisons were a *divisium imperium*, it seemed reasonable that the cost of the desired changes be met by a Treasury grant. This was demonstrated by increasing financial intervention from 1835 and exemplified by the Finance Act of 1846, which met between a quarter and a third of the total cost of running local prisons. Prisons which were located in local boroughs, that were not included in the municipal reform of 1835, were not considered for this grant and all local prisons still had to meet

over half of the cost of the proposed changes themselves. Unsurprisingly there was still resistance to them.

In Bedford it took ten years for a jail, along the lines suggested by the inspectorate, to be established; ratepayers beseeched magistrates not to add to an already 'heavy burthen' of taxes. In Warwickshire there was little inclination on the part of the tenant farmers to subsidise what had become an increasingly elaborate and abstruse question in which there was 'little common-sense distinction' between the varying positions. Similarly in Lancashire separation was only introduced in a piecemeal fashion and a total conversion to it was never effected partly due to the reluctance of ratepayers to approve increased expenditure. Thus not everyone was impelled to take sides; for many it seemed that the parry and thrust of the debate had become so complex that it left them baffled. Although the logic of a competitive contradiction promotes division, the very intensity of conflict may in fact work against that since less and less people may have the ability, patience and time to understand the intricacies of the debate.

This unintended and unexpected consequence is due to each side being pressurised, in the face of competition, into coming up with ever more sophisticated and elaborate formulations of their own policies. For those who were not involved from the outset, such as most of the county administrators who were expected to pay for these increasingly elaborate ideas out of increased rates, there was less and less sense in the distinctions drawn between these two systems and precious little difference according to their eyes, which did not warrant greatly increased expenditure. The result is



that, initially, a compromise was worked out by a half-hearted conversion to the new ideas and full-scale renovation of local prisons would only come about from intense government supervision.

What of the penitentiaries under central government control? Did administrative developments proceed apace with the continuing debates? The inspectorate seems to have persuaded the Secretary of State to sanction the construction of a new prison at Pentonville where convicts would serve part of their sentence before being transported to Australia and it was stressed that conditions, in which they would live, depended upon their conduct under the separate system. But following public criticism of the rate of insanity the period of separate confinement was reduced from eighteen to nine months; this failed to still disquiet and in 1849 all reformatory efforts were stopped and Pentonville was transformed into a convict depot like Millbank. In 1848 Portland prison was opened so that prisoners could undergo a period of associated labour where, if conduct of an 'exemplary manner' was displayed, some remission of their sentence was gained. As transportation was winding down, more and more sentences were being served out in full at places such as these.

This was a divergence from the theory of separation and was, in fact, a response levelled at it by people like Chesterton. Jebb, the Director of Convict Prisons, could say of associated labour that it had the advantage of 'preparing the men, whilst under control, for the temptations that await them when released from penal discipline; also, that it affords an opportunity of inuring the men to useful labour and encouraging persevering industry'.<sup>30</sup>



Although Jebb justified associated labour as having a 'more or less of a deterring influence on individuals', Forsythe is correct in stating that the system was being promoted on its reformist merits. Jebb himself took issue with those advocates of a purely coercive penal discipline and countered that 'the reward of the well conducted is as essential an element in the discipline as the punishment of such as persevere in misconduct'.<sup>31</sup>

Associated labour attempted to instil in the prisoners a realisation that reward would succeed work: granting a badge after six months and a gratuity with an additional one for an increased amount of work over the prescribed limit which was to be not only a stimulus to work but also due to the increase in work would effect a saving; hence prisoners would 'contend against their propensities' to pursue immediate pleasure. It was hoped that such a process, repeated many times, as the prisoner played out his sentence would inculcate the habit of work, so that eventually prisoners would work diligently without hesitation. Separation was now seen as a preparation for association in which the chastened prisoner could gradually accustom himself to a new mode of conduct, in a controlled environment, before being released into public life where no such control was possible. So effective did it seem to be that Rev. Field, a hitherto staunch advocate of the separate system, expressed his satisfaction that his fears had proven groundless.

The emphasis upon reformation was pushed a stage further by Alexander Maconochie who developed what was called the marks system, whereby prisoners, instead of serving a sentence based upon a passage of time, had

to labour in order to collect a certain number of marks and upon attaining these marks would be released. He believed that the 'real secret is to make the inside of prison resemble as much as possible the outside'<sup>32</sup> and faulted the separate system within prisons for gathering prisoners together but endeavouring to ensure that they were uninfluenced by each other, which he believed to be impossible. He objected to the stage system because it did not engage the prisoners' own desires. The prisoner merely had to while away his time, knowing that he would be released in due course. There was no incentive to apply himself with great zeal to tasks since it would not make an appreciable difference to his release, and so the stage system was said to encourage indolence.

The prisoner could use the marks earned either toward his release or to purchase some comforts which the prison did not supply. Most choices concerning the prisoner would devolve upon him and so the marks would help stimulate those feeling which make 'men honest, industrious and prudent in free life'<sup>33</sup> and would discount those which lead to vice. Before everything was done for the criminal, but now, instead of being treated like a child, responsibility would be thrust upon him. The most radical aspect of this program was to replace time with task sentences, with a minimum but not a maximum time to be served, but he and his supporter, Charles Pearson, claimed that they were merely fulfilling the biblical injunction that he who labours shall prosper.

Like all those before him, Maconochie claimed that these proposals would reconcile deterrence and reform, 'it will adjust the controversy between



harshness and lenity which has long divided reasoners on the subject - the one impulse having authorised the most distressing cruelties, while the other has occasionally led to indulgences scarcely less injurious in their ultimate consequences to both criminal and society'.<sup>34</sup> But this was somewhat disingenuous, since Maconchie knew he was deviating from traditional forms of deterrence. He was offering a re-interpreted version of it, to fit with the emphasis he was lending to reform, as he believed that the deprivation of the prisoners' liberty was punishment enough. He argued that 'imprisonment is sufficiently direct punishment to be inflicted on criminals subjected to secondary punishment; and that beyond the restrictions necessary for their order and safe custody, every part of their treatment should be directed exclusively to their improvement'.<sup>35</sup>

Writing in 1850, Dixon could claim that there were five systems of prison discipline which had advocates: 1. The City System. 2. The Separate System. 3. The Silent System. 4. The Mixed System. 5. The Mark System. The City System was unreconstructed, regimes which the government inspectorate had failed to persuade to alter: Dixon commented that no one 'openly justifies these evils; the bronze face of mammon is not equal to such a task'.<sup>36</sup> He is clear that these prisons were 'unreconstructed' because those in charge had not been persuaded to find the resources to fund improvements, but also had not been able to develop an adequate counter-argument that would justify their recalcitrance, so that a stalemate had been reached. It would be regimes such as these that would justify the inspectorate's request for further coercive powers.



In 1834, Crawford initiated a process designed to install the separate system throughout the country and to suppress all disciplinary programs which conflicted with it. This could only be achieved by enlisting the support of central government which had the power to issue legislation concerning the state of prisons; but after 1835 this increasing rate of legislation was effective only if matched by grants which would go some way toward defraying new costs. The intention was that there should be only one type of penal discipline but the result was such that Dixon in 1850 could claim that there were five distinct systems of prison discipline, each of which had their advocates. This proliferation was the unintended result of all the interested parties trying to establish their program as the dominant one, inciting their opponents to scrutinise it closely to uncover flaws.

It is important to note how such a process came about. Not all development can be attributed to growing intellectual unease; many adopted the silent system or a modified version of it for very practical reasons. They were unwilling to countenance another hike in rates to pay for the complete reconstruction of prisons according to the separate system.

### **3.3 The urge to unify**

If there was such diversity in models proposed for discipline, how could there be any uniformity in penal practice? This was not resolved at the ideational level alone, yet it would be an error to view it as a result arising

from whoever possessed the biggest stick. One of the greatest reasons for instituting the reform movement was the apparent disparity between crimes and punishment and between penal practices, as meted out to offenders, so that ideas did count. As I outlined in Chapter 2, the Quaker reformers had fashioned these incongruities into an effective call for change to both sentencing and prisons. It is a testament to the ready compatibility between punishment and justice that no-one thought to try to repulse these calls by developing a counter-thesis, but merely invoked reasons as to why this relationship was not yet being fully observed.

I propose to examine the linkages that were made between the ideas of punishment and justice, a relationship I termed a necessary complementarity, which denotes a relationship whereby one idea automatically invokes the other, and cannot be construed apart from it. Since the connection is so obvious, few people will be able to come up with a counter-proposal that will refute this linkage. No-one disputed that punishment by the authorities was not just a private affair so that punishment would have to abide by principles of justice- it would have to seem to be approximately equal. As punishment was becoming a matter of concern for national government, it was frequently argued that punishment should not differ simply because of local boundaries, but as a matter of equity should be uniform throughout the country. As T.F Buxton admonished

parity of crime ought not to meet with disparity of punishment. It is the chief boast and glory of Great Britain, that equal justice is administered to all, but it must surely be admitted, that an

exception to this exists, while imprisonment is relaxed or aggravated, not according to the degree of crime, but, in fact, according to the geographical situation of the place where it is committed.<sup>37</sup>

What is often overlooked in penal histories is that this principle was not only being carried out in the sphere of prison administration but also in the area of criminal law, where there was an attempt at codification. Certainly there were different individuals striving for uniformity in each area, but the practices of the courts had a great influence upon the operations of the prisons. The objective to be met by centralisation of the prisons, the standardisation of punishment, was only seen to be partially achieved, since the judiciary still determined the length of sentences passed upon prospective prisoners- an operation which seemed, to many, to lack any consistent systemic principles. Why, then, did the systematisation of the criminal law fail and the centralisation of penal practices succeed?

One of the first steps towards greater uniformity was facilitated by Peel's Gaol Act of 1823, which was the result of pressure from all sides to consolidate the criminal law. The Act required the local Justices to operate their prisons according to a prescribed plan and to offer quarterly reports concerning prison administration to the Home Secretary. Inspection was not contemplated and there was no mechanism with which to compel refractory local authorities; moreover it was restricted in scope, ignoring the London and provincial prisons which were most in need of reform. Rather the legislation was enacted in the hope of awakening a greater sense of



responsibility towards the prisoners under their charge. Before 1835, the Treasury only paid for the expenses of what were a few exceptional cases and the local authorities stumped up for the general maintenance of their prisons; thus little pressure could be exerted upon the local prisons to instigate changes.

The failure to secure improvements in many of these prisons led many to believe that change could only be gained by an increase in governmental supervision. Bentham was quite clear that any such reform should proceed from the expectant utility that would be gained from a more uniform administration of the criminal law. He was also explicit in denouncing the judiciary for offering what amounted to their own interpretation of the law, yet who seemed to be implementing decrees issued by the sovereign body of the land, so covering their own partiality with the cloak of impersonality.

Bentham's project to reform the criminal law was part of a wider attack upon the Common Law, which was held to be both in accordance with natural law and expressive of the will of the people. Both these beliefs served to conceal that the Common law was nothing but 'private opinion in disguise'; but by being clothed with the appearance of public assent, no justification of judicial decisions was thought to be necessary.

So that the law adapted to changing circumstances, it had become 'a complex thicket of technical rules, antiquated concepts and mysterious procedures'<sup>37</sup>, which the ordinary citizen could only penetrate with the aid of lawyers skilled in such matters: 'he is reduced to consultations - he assembles the lawyers - he collects as many opinions as his fortune will permit', a

process which only serves to sow 'new doubts'.<sup>38</sup> Again the law is removed from public consideration and into a province frequented only by specialists who, due to their monopoly of such esoteric knowledge, could charge the general public whatever they pleased. The Common Law serves not the people, but a professional elite.

The Common Law could not be legitimated by appealing to the consent of the people, but its very complexity blocks the possibility of their any reasoned compliance with the law. Therefore its exercise constitutes a tyranny over the people, what Bentham called dog law, since it is only possible to learn of the wrong done after the offence.

The lack of any rationally considered principles at the heart of the Common Law leads to an oscillation between arbitrary judicial decisions and extreme rigidity in clinging to past decisions, the *fiat justitia ruat coelum* mentality. Since Bentham believes that one of the functions of the law was to provide stability, a steady adherence to established rules as he calls it, the judge will more often than not ignore particular circumstances and even if he chooses to attend to them, any solution can only be partial. The Common Law sought to derive its authority from an unwritten law, which Bentham claimed was loved by lawyers 'for the same reason that the Egyptian priest loved hieroglyphics, for the same reason priests of all ages have loved their particular dogmas and mysteries. They are a source of power, reputation and fortune'.<sup>39</sup> Only by giving the law an explicit verbal form could it be freed from obscurity and comprehended by all, understood without art; any estimate



of the meaning of an unwritten law Bentham professed to find metaphysical.

Brougham, the Lord Chancellor, who was friendly with Bentham recommended to the King that a Royal Commission be established to try to bring order to what seemed a mass of unconnected elements of the criminal law. Though they shied away from the task of codification, their attempts to summarise all enactments touching upon criminal matters into one or two statutes was often construed as such. That similar offences and that seemingly trivial offences could occasion disproportionate punishments caused 'great uncertainty in the application of punishment'.<sup>40</sup> Since the law seemed to offend against ordinary moral sense, it was often disregarded. Disparate judgements also resulted from the 'peculiar notions of policy entertained by different individuals, or their firmness or resolution of mind'<sup>41</sup>, the point against which Bentham fulminated so angrily. This was held to be an injustice since the potential offender could not possibly calculate the consequences of his or her actions. The commissioners catalogued that the present administration of justice was indiscriminate, disproportionate, unsystematic, and 'ill adapted to the effectual prevention of crime'.<sup>42</sup>

The Commissioners proposed to erect a system of criminal law which countenanced the existence of defined aggravations which would make good 'the scarcity of distinctions defining the gradations of guilt and annexing commensurate penalties'.<sup>43</sup> No longer would 'sweeping distinctions' run together crimes which were morally incomparable but which carried similar



penal consequences. Though they were classicists in their belief that crime was due to the exercise of the offenders' free will, they were less certain that all relevant circumstances could be encapsulated within a code. Thus some judicial discretion would have to be retained.

This is not to underestimate the vast task which they undertook, and from which resulted what we should expect from the existence of a necessary complementarity, namely the extensive drawing of links and relations between offences and their punishment. Since the two ideas seemed made for each other, as each automatically invoked the other, this encouraged people to explore the extent of the relations between them. Punishment and justice represented a hitherto unscoured area, as previously the matter of just punishments had been left to local magistrates and authorities, so that the links between the two still remained to be forged. The Commissioners wished to draw up a unitary scale of punishments against which they could set particular types of offences. Indictable offences were collected into four classes according to the degree of punishment they incurred in their second report:

1. Capital offences

2. Offences punishable with imprisonment for 10 years or more, or transportation for life.

3. Offences punishable by imprisonment with a maximum of 10 yrs. and a minimum of 2 yrs., or by transportation not exceeding 14 and not less than 7 yrs.

4. Offences punishable by imprisonment not exceeding 2 yrs., or transportation not exceeding 7yrs. or a fine.

By the time of the commissioners' fourth report, the number of classes had expanded to fifteen, each with a maximum but not a minimum penalty. Making ever more elaborate distinctions among crimes called for an even finer recasting of punishments 'in order to ensure the consistency of the whole system'.<sup>44</sup> One of the greatest obstacles to achieving consistency was providing for aggravations of crime, which the law then did not recognise, giving the example of three men breaking into a building and stealing £1,000, an offence which was treated as identical to a boy stealing an apple from a stall. Thus by their 7th report the number of penalties was 45, due to the desire to distinguish the gravity and moral depravity of an offence, and to further restrict judicial discretion.

In 1845, new commissioners were appointed to review the consolidation of the criminal law. They were less enthusiastic about ensuring systemic consistency, reducing the scale of penalties to 13 and then increasing it to 31 before finally settling upon 18. They were less keen on hedging in judicial discretion, abolishing those punishments that were mandatory and many of those which had a minimum punishment affixed, but still wished to define those aggravations which should carry a greater punishment.

When the finalised report of the commissioners was being presented as a Bill, the Lord Chancellor sent it to various judges asking for their comments. Their hostile replies scuppered the whole process, as they revealed themselves hostile to the very principle of codification, claiming that

it was an unnecessary encumbrance which would restrict the freedom of the judges to adapt themselves to changing circumstances. They ridiculed some of the definitions and attempted to point out minor inconsistencies and imprecision in their formulation. This signal from the judiciary alerted opponents in Parliament, many of whom were county justices, magistrates or solicitors; when a select Committee concluded that it was 'inexpedient at present to press forward any Digest'<sup>45</sup>, codification had come to a close, for the time being at least.

The earlier Commission, having resolved that justice was being impugned by the great diversity in punishments, determined that judicial discretion should be restrained and came to the logical conclusion- judges should simply read off which punishment should be applied, the 'application of legal propositions logically derived from statutory texts'<sup>46</sup> which Weber believed was the hallmark of rational law. He was also aware that a 'systematic and comprehensive treatment' of the law was highly unlikely to emerge from the traditional practices of English lawyers, as it was oriented to the practical exigencies of everyday life; nor would any insertion of a more rational system of law be welcome, since the lawyers 'material interests are threatened by every interference with the traditional forms of procedure'.<sup>47</sup> But material considerations were not the only objection: the 'status of being confined to the interpretation of statutes and contracts, like a slot machine into which one drops the facts (plus the fee) in order to have it spew out the decision appears to the modern lawyer as beneath his dignity'.<sup>48</sup>



The work of the law reform Commissioners represents a clear example of what happens when two ideas, necessarily connected, are brought together. Once it was admitted that justice should not admit of wide variations in its application, that punishments should not reflect a partial consideration, then the role of the judge was necessarily squeezed out, as the coda of law become ever more elaborate to reflect the complexity of everyday life. The logical result is something like the elaboration of 45 grades of punishment, each to be consistent with the other. But for those who were not ploughing this particular furrow, it appeared a particularly barren exercise, growing as it did in complexity, seemingly far away from ordinary concerns. It was rejected for 'substituting new fictions for old realities'.<sup>49</sup> It should be noted that both the traditionalists and the reformers levelled a similar accusation against each other: each side's method of divining the essence of the law represented a step away from reality into a realm of abstract complexity, which betrayed the notion of equity that was the heart of the law.

Unfortunately, the frigid reception ensured that no part of the codified criminal law would be enacted, depriving us of the opportunity to see how it and its proponents coped with its interface with unforeseen circumstances. What is particularly interesting is that this effort should fail whilst great strides were being made to develop a more uniform manner of punishment within the prisons. Thus the effects obtained by the link of punishment and justice were not an all-or-nothing affair, but were achieved piecemeal, progressing here and being stunted there.

The knowledge scenario here has the greatest affinity with the Foucauldian notion of knowledge leading ineluctably to power but is distinct from it for two reasons. They are: (1) There is no way of knowing how long it will take to fill out the initially promising connections between the two ideas; until this is done the ideas will remain in an unworkable state; (2) even if this is achieved there is no guarantee that it will automatically result in power. There may be other obstacles, such as opponents possessing a wealth of material resources, so that they have no need to turn to ideas for legitimacy; and even if this is not the case and the connections between the two ideas are fully implemented, there is no guarantee that this will not create further problems. I will argue that this was the case of a uniformly deterrent prison regime, which, by insisting on similar treatment for all prisoners, incited agitation among those prisoners who saw themselves as distinct from others. I will now turn to the reasons for there being a swing-back toward deterrence.

### **3.4 A backlash beckons**

Writing in 1837, one of the inspectorate expressed his fear that with so much emphasis being placed upon reform that the deterring effect of prisons would be neglected. This problem is one of the concerns of this thesis: how to carry out two contradictory proposals and ensure the efficacy of both. The prison authorities gave it little consideration, a lack of foresight which contributed to a mood against reform.

In the 1850s fewer and fewer prisoners were being transported to Australia, due to objections from the settlers themselves and concern about its deterrent qualities. The prisoners being transported in 1850 were said to be of a very different class from those who had preceded them, having passed through an intermediate stage at Portland, but most importantly labour was in demand, regardless of its guise. When transportation was discontinued to Van Diemen's land in 1852, the problem was how to cope with those prisoners released early in England. There was far less of a demand for labour and consequently a 'fastidious rejection of all those whose character [was] tainted'.<sup>50</sup> There was a fear that if the prisoner failed to secure employment soon after his release, he or she would turn again to crime but close supervision by the police was ruled out, lest they be branded as criminals. As Jebb put it: 'the theory of protection to the public would have been destruction to the convict'.<sup>51</sup> Though this was justified as preventing the growth of a refractory criminal class, many did not take such a long-term view and it seemed that the interests of the prisoners were being placed above their own.

The 1853 penal servitude act abolished transportation except for those who had received a sentence of 14 years or life. Before the 1853 penal servitude act those who had exhibited good conduct, whilst awaiting transportation, could gain a remission of their sentences, so that, for example, a convict serving seven years could be released after four years. But as transportation had ceased, so did remission, causing disquiet among the prisoners. Jebb remarked that 'a feeling of recklessness is beginning to



pervade the whole body of frustrated convicts'.<sup>52</sup> The Home Office was reluctant at first to approve of wholesale remission but after negotiations agreed to grant 'tickets-of-leave' to many of those who were to be transported overseas.

Those convicts in the 1853 batch were not eligible for remission but to encourage them, they were granted privileges on the basis of the progressive stage system. Some contemporaries were incredulous at the notion of persuading the prisoners to behave well, rather than punishing them if they did not. They believed that rewarding prisoners contravened the principle of less eligibility, that prisoners should not be better-off than the least well-off person in society.

The organisation of the ticket-of-leave was extremely haphazard since it required the holder to remain in a particular district and return home by 10 o'clock and to report periodically to the police. There was no means of checking on the released prisoner, since the Home Office was unwilling to recommend police surveillance. They believed it would amount to harassment and would make it much more difficult for the ticket-holder to secure employment, although it was also argued that the conditions facilitating its introduction in Ireland did not pertain to England and Wales.

Since supervision was so rare, these people were easy scapegoats for any supposed increase in the crime rate, with one Lord stating that 'the safety of society would soon be at an end'.<sup>53</sup> Towards the end of 1855 several newspapers dismissed the practice of early discharge as a sham, since it released unreformed prisoners who had not served their full sentence. Jebb

tried to defend the system, claiming that the failure rate amounted to little more than 3% a year, but this was said to be because of the complete lack of supervision and knowledge about them.

A select committee pointed out that many of the public may have been confusing discharged criminals and ticket-of-leave men but expressed concerns about the lax supervision and the failure to enforce licence conditions. Bartrip tentatively writes that 'Parliament and the national press were, on the whole, though not uniformly, inveighing against ticket-of-leave evils and, arguably in doing so, they were reflecting more general, though unquantifiable, public concern'.<sup>54</sup>

If public opinion was so opposed to the reformatory treatment of criminals, how did such an extensive penal regime based upon these principles ever come into being? The Times offered an explanation in an editorial :

The philanthropists.... have got control of penal administration, and as long as the public mind was not forced to think of convicts, it willingly acquiesced in an arrangement which was supposed to be equally beneficial to the sufferer under criminal law and society at large.<sup>55</sup>

It is true that the demise of transportation brought home to many that mishaps in penal policy would no longer be borne by the colonies, and that prison discipline would become more than ever material to the elite of the country. Though it is difficult to pinpoint those events which were decisive in swinging opinion against reform, the garrotting scare of 1862 is often

depicted as the straw that broke the camel's back, though others argue that changes were simply the result of people slowly getting to grips with the problem of serious and persistent offenders who remained in the country.

Certainly by 1863 there was a belief that crime was on the increase and that some of the blame should be apportioned to a lax regime in prisons. This laxity was partly due to 'well intentioned theorists'<sup>56</sup> who thought it best to promote moral influences above deterrent labour, and also to a lack of uniformity in prisons throughout the country. This led to the appointment of a Royal Commission to enquire into penal servitude, which concluded that it was not a sufficient deterrent, either to those who had undergone it or to prospective criminals. Criticism was also expressed of the ticket-of-leave system on the basis that it induced hypocritical behaviour in the prisoner, and any assessment of genuine reformation by the prisoner was practically impossible. It was asserted that it was the most dangerous and cleverest type of prisoner who was able to hoodwink the prison staff into granting him remission.

Also in 1863 a select [the Carnavon] committee was convened to enquire into the state of county and borough prisons, and it was particularly interested in two aspects of the system: 'the degree to which it was administered symmetrically throughout the realm and the amount of severity felt by prisoners subjected to it'.<sup>57</sup> The sentiments which were expressed most strongly, were frustration at the diversity still existing in prisons and scepticism at the effects of reformation. The separate system was praised by a few witnesses for its reformatory effects but many prison staff were



exponents of its potential for deterrence, believing that it was impossible to ascertain when a prisoner was reformed or not. Jebb agreed that reformation was impossible in local prisons, owing to the brevity of sentences, and that the aim should be to deter. This would involve separate isolation combined with the enforcement of distasteful hard labour of a penal character.<sup>58</sup> This model should be along the lines of a military prison, in his famous phrase of 'hard labour, hard fare and a hard bed'.<sup>59</sup>

The recommendations reflected this aspiration toward severity as well as a resolve to eliminate asymmetries within the penal system. Uniformity of labour, diet and treatment which were necessary to overcome the inequality, uncertainty and inefficiency of punishment, 'productive of the most prejudicial results'<sup>60</sup> were also recommended. Hard labour was thought to be the best means to deter, so the crank and treadmill were introduced in place of vocational training, and scepticism was reiterated about the efficacy of reformation and that punishment by itself was by means prejudicial to the prisoner or useless to society.<sup>61</sup> This was to be carried out for the first three months, with elevation to a higher class obtainable for those whose sentences exceeded this time. Greater powers were sought for the Home Secretary to obtain the desired uniformity of practice within the prisons, but rather than antagonise the magistrates by setting down statutory definitions which would have to be complied with, some broadly defined regulations were introduced. The inducement towards uniformity was provided by the threat of withholding the Treasury grant from local authorities and in the

face of a persistently refractory attitude the Home Secretary had the power to close down prisons.

Though the Royal Commission was not as pessimistic as the Carnavon Committee on the possibility of reformation, they still suggested that penal servitude be made more rigorous by increasing the total amount of time spent in prison, with the minimum sentence being increased from three to five years. Reconvicted felonists were to receive a prison sentence of a minimum of seven years and restrictions were placed upon those convicts granted a ticket of leave; a breach of these regulations left the convict liable to serve the rest of his sentence or three months imprisonment.

Any exercise in historical reconstruction inevitably involves selection and here I have concentrated on the relationship between deterrence and reform. Ideas do not stand in a single relationship with one other idea, apart from all others; thus the idea of deterrence was bolstered by the prevalent notion of less-eligibility, that prisoners should not enjoy a better standard of living than the most common citizen. Since this was so low, it was inevitable it would be breached in some respect, and some prisons possessed facilities not even enjoyed by hotels. The prisons were then vulnerable to the requirement that they should find means of devising a more deterrent regime to compensate for these perceived failings.

The prison reformers were always in a minority though they did work themselves into position of influences but never succeeded in convincing either Parliament or many in the regions of the need to reform prisoners. Far from being seen as brutal

or repressive it was feared that they [the prisons] would give the criminal classes a taste for luxury and accustom them to standards they could never attain by honest means. The discipline enforced inside prison with its stress on learning and religion was deemed soft and ineffectual....Those who cried out against the measures of the 1860s because they feared the further brutalising of the prison population were shouted down by the majority who feared for themselves.<sup>62</sup>

I have outlined a period when reform was favoured but this does not tally with the Foucauldian account. For one, the agreement about ends did not extend to means, as some put forward models from conviction, others from indifference, with the result that there were five distinct models by 1850. This proliferation was partly checked by one group taking hold of the machinery of government and issuing restrictive legislation, which favoured its own particular model of prison discipline; although it was a frustratingly slow business for those who were trying to imprint their own system of discipline upon the local prisons. What aided the government inspectors was their being able to legitimise their enterprise by linking punishment in the prisons to the question of justice, a knowledge scenario which is the closest to the Foucauldian notion of knowledge leading to power, but is not completely akin to it. This linkage lent legitimacy to their enterprise but did not place them immediately in a position of power.



Reformatory efforts succeeded in the prisons for a time because events there did not impinge upon the affairs of those who had the power to call a halt to these efforts. The reason why a contradictory pair of ideas was able to survive was that it was peripheral to many people's lives, until released prisoners were deemed to be responsible for the assaults that spread fear amongst the well-to-do. After this, sterner action was demanded which would reassure those concerned that these assaults would not reoccur, which meant that deterrence was favoured since it seemed to offer the requisite punishment. Unlike the power/knowledge approach, the method that I outline allows for the possibility that emphasis may swing from reform to deterrence and back again, and can scrutinise the means by which one or the other is accentuated. This raises the question why and how is one or other emphasised for the period it is? It is to this emphasis on deterrence that I will now turn.

#### 4. Upholding Deterrence

The emphasis will now shift to how policies of deterrence were maintained at the expense of reform. Attention will focus on the tactics, employed by those in charge of the convict prisons, to conceal the extent to which they were favouring deterrence and how the repercussions of this policy impacted upon various sets of prisoners, who were not amenable to its implementation. I will show how, despite the massive imbalance in resources between the penal authorities and proponents of reform, the need to maintain some measure of reform gradually told against the attempt to favour deterrence. I will also show how the apparent success of deterrent policies (indicated by a drop in the crime-rate) focused attention on those who were unaffected by a deterrent regime and led to calls for policies of reform.

Although reform had not been completely discounted post-1865, it was clear that it was being shaped to fit the contours of deterrence. This second episode represents an interesting contrast, not only because deterrence was the favoured policy, but also the means by which this exclusivity was defended. In the period up to 1865, it could not be said that power was exercised to maintain the prominence of reform, even when it came under attack in the late 1850s, unless we labelled the inspectorate's efforts to persuade as a manifestation of power. The succeeding period shows a marked departure from this relatively quiescent era, as the prison commissioners made concerted efforts to conceal the true nature of their

activities, so that information, which might have incited tentative reformatory campaigns into bolder action, would not leak out. The contrast is captured in the claim that

whilst Jebb was in charge, reports had been published annually; they had included comments on the great debates of the day and brought into the open internal differences of view between chaplains and governors. Under Du Cane, they underwent a marked change in tone and content. The accounts from governors, medical officers and chaplains became shorter and shorter and, from 1878, no longer carried the signature of their authors. They also became stereotyped, with the same information appearing over and over again. Statistical tables improved, but any evidence of internal criticisms or doubts had disappeared.<sup>1</sup>

It should be remembered that this stricture applies to the local prisons only after 1877, when central government assumed control of them to establish a regime of secrecy and censorship. Since the prison directors enjoyed far greater control in the convict prisons, they were able to act in ways that were not possible in the local prisons (at least not until after the assumption of control by central government). Within the convict prisons, actions were intended to suppress or drastically curtail any reformatory efforts as these would impede attempts to implement a policy of deterrence within the prisons; hence the complaints that the directors were only paying lip service to education within the prisons and the disaffection exhibited by the clergy over their increasingly marginal role. It is evident why such a



policy was doomed to failure, primarily because what was at issue was what we termed a necessary incompatibility, so that one of the ideas could not simply be discarded, desirable though this may have seemed. Since reform could not be eliminated, then there arose the question of just how much was enough or how little could the directors get away with retaining.

So the idea of reform could not be completely discarded even if some did so wish, but there were also willing advocates of its indispensability within the prison walls, the most obvious being the prisoners themselves, but also the clergy. Since many of the first group could never be convinced of the legitimacy of the actions meted out to them (particularly those self-styled political prisoners, who were mostly Irish), it was necessary to prevent them from airing their grievances.

This raises the obvious question that since reform could never be simply 'ditched', then who could be sufficiently trusted to ensure that its presence did not dilute the efficacy of deterrence? This entailed the second strategy (the first being the use of power to conceal the exact nature of the prison regime), taking control of the prisons away from those who entertained differing ideas about the place of reform within a penal strategy, and concentrating power in the hands of the few who could be trusted to operate a policy of deterrence without paying obeisance to reform. Hence the policy of nationalisation was a reasonable extension of the move to place so much emphasis on one of the two elements of which punishment was composed; it was not simply due to an implacable desire for control by a small band of prison directors. Whether this singular policy succeeds or

not, depends, in part, on those proponents of reform being determined enough to surmount the barriers placed before them, to instigate their own favoured policy.

There is a paradox at the heart of such a policy of concentration (or nationalisation here) in that it seeks to wrest control of the prisons from those who cannot be trusted to favour the desired policy and place it in the grasp of the faithful. This extension from the centre depends upon a continuing supply of personnel who can be so trusted, a task which becomes all the more difficult the wider the ambit of centralised control, as more and more people are required to carry out the delicate balancing act.

The fruitfulness of distinguishing these two aims can be seen by asking ourselves a counterfactual question: what if those in charge of the local prisons had been committed to operating a policy of deterrence? It would still have been necessary to erect a barrier to ward off those 'lay commentators' who would have been concerned at the paucity of the efforts at reform, so as not to expose the single-minded policy to the public. And likewise if there were no prisoners agitating for reform but many local prison authorities had been recalcitrant in imposing a program of deterrence, the drive towards centralisation would still have been necessary, to ensure that the desired regime would be established.

#### **4.1 The Convict Prisons**

Du Cane, Chairman of the Directorate of Convict prisons, was adamant that punishment was inflicted primarily to ward off potential criminals, so

that punishment was 'much more for the purposes of deterring from crime the enormous number of possible criminals, rather than for any effect on the criminal himself';<sup>2</sup> thus any change effected in the individual prisoner was considered an incidental benefit. The inmate was a means towards securing the end of a reduction in the general rate of crime, and little concern was evinced to induce a voluntary change in the individual.

This is not to say that the prison authorities were given *carte blanche* to mete out any treatment which they saw fit; their actions were (theoretically) circumscribed by the sentences of the courts, a restriction partially inspired by utilitarian beliefs, that no more pain than was necessary should be brought about to achieve the desired goals and also by the desire to bring about a greater degree of uniformity.

The era of deterrence was ushered in under a mood of pessimism concerning the very possibility of transforming individuals according to a reformatory program; indeed, there was a growing consensus that there were many prisoners incapable of transforming themselves as criminal behaviour was becoming synonymous with mental deficiency. This point was expressed by Edmund Du Cane when he spoke of a large number of prisoners 'whom it is impossible to influence and who must be dealt with in course of the law, not for much result in themselves, but to carry out the principle of justice and mainly to deter others. Such characters may probably be set down as in a certain sense mentally deficient'.<sup>3</sup> This lack of faith in the ability of many criminals to reconstitute themselves and a wish to eradicate regional variations, made the adoption of a deterrent regime the more



sensible option. How did those with most at stake react to the change in regime and what were they reacting against?

A convict, upon being introduced into a convict prison, was placed in a cell for nine months during which he received religious instruction from behind a locked door, in contrast to its associated nature in the previous regime. Following this, the inmate would be sent to labour in a public works prison, where he could earn marks for work performed; if a certain number of marks was obtained then the convict could move on to a third class, thence to a second and eventually to a first. If a prisoner attained the maximum number of marks then he could get one-quarter remission of his sentence. Each was distinguished by a greater presence of gratuities and rewards, though these were meagre relative to what had obtained before.

Rewards were reduced drastically as these were believed to be an inducement to hypocrisy, and so it was decreed that prisoners could only speed their progress through prison by toil. Little of it was designed to teach them anything of value other than trying to instil a great aversion to prison and its operations; it was described by one official as ‘incessant, often arduous and painfully harassing’.<sup>4</sup> The Howard League went further claiming that most of the longer-term prisoners were ‘ruined for life by being rendered permanently bedridden invalids’.<sup>5</sup>

Diet was another matter which came under assault: a committee was established to examine it; at the outset the chairman iterated that the diet ‘should minister to their correction by being as unattractive and monotonous’, and since they were being incarcerated at a cost to the

community, 'it ought to be as economical as possible',<sup>6</sup> two objectives which neatly dovetailed together. The amount of food was cut by 20%, and all luxuries such as beer and tea were forbidden, with the food itself being rough fare.

Punishment, above and beyond the daily routine, also saw an increase, though it should be said that the option of sending continually refractory prisoners overseas no longer existed. Corporal punishment increased, as did the less severe punishments, such as forfeiture of marks earned which meant a loss of time gained toward remission. A common complaint was that disciplinary measures were incurred for actions which it was not realised were infringements. The afore-mentioned official noted some of these as an 'untidy cell', and 'hesitating to obey orders',<sup>7</sup> amongst others; Radzinowicz and Hood estimate that about 40% of prisoners were punished each year.<sup>8</sup>

The simplest and shortest path to uniformity was to treat all convicts in a similar fashion; yet there were many categories of prisoners who could not be pigeon-holed so easily. The Fenian prisoners were the most vociferous in protesting at what they believed to be ill-warranted and degrading treatment, yet there were others, such as women and juveniles, whose very presence within the prisons disrupted any attempt to apply a policy of uniform deterrence, since it was believed that these groups should not be subject to such treatment.

In 1848, following an insurrection in Ireland, it was decided that not enough Irishmen were being imprisoned for such disruptive behaviour; they could either be beheaded or charged with the misdemeanour of sedition and



thus be granted bail. The Treason-Felony Act of 1848 was designed to strip from those, who had been disloyal to the crown, the dignity customarily attached to the status of traitors and so denigrated them to the position of felons. When the leaders of the Fenian movement were arrested in 1865, they were convicted of treason-felony and most of them were sentenced to 15-20 years penal servitude and transferred to English convict prisons from Ireland. The Fenians protested against being classified as ordinary felons, in common with the 'garroters and Sodomites of England' (O'Donovan Rossa), since they believed they represented a special category of 'political prisoner' and argued that they should receive special treatment which distinguished them from common convicts. This was incompatible with the policy of uniform treatment of prisoners but there was no possibility of persuading the Irish to accept their newly-assigned status. Since the legitimacy of prison regime partly depended on impartial treatment, the prison authorities had little choice to implement their program without prejudice. The Irish continuously agitated for better treatment using their connections with the Irish members of Parliament, though it is unclear to what extent the prison authorities tried to obstruct them.

Certainly some of the Irish believed that those in control of the prisons did as they saw fit and had embarked on a policy of what we might call cultural repression, which puts the best face forward by removing any apparent blemishes, if not by radical surgery, then at least by a judicious application of make-up, making things appear better than they really are. Yet radical surgery in the form of transportation or execution were ruled out,



since the Fenians were to be treated as ordinary criminals. Thus recourse was had to efforts to portray them as men of lowly character, not of moral integrity; this tactic was of limited effectiveness since it was primarily intended for domestic consumption. That they were regarded by many of the Irish as heroes shows how difficult it is to eradicate ideas once they gain a foothold; the idea of equating the Fenians with petty thieves cut little ice with those who thought they knew them best. This shows that efforts to further a particular favoured interpretation of events through the use of power may often backfire, if the intended message is incongruous with previously-held beliefs and so may exacerbate the problem by encouraging the unconvinced to put forward their own beliefs, in an effort to put the record straight.

At first, attempts to gain a sympathetic hearing for the Fenians were greeted with derision, yet a campaign continued as the Irish were convinced of the injustice of their treatment. In 1867, the Home Secretary appointed a commission of inquiry to investigate such complaints and they were dismissed as 'a tissue of falsehood and misrepresentation'<sup>9</sup>, concocted by troublemakers. Plaudits were handed out to all involved in the administration of the prisons and any relaxation in discipline was discounted since 'the convict authorities....must do their duty to all alike- even though insistence on equality produced inequality'<sup>10</sup>, a revealing aside since it showed that the prison directors were aware that applying a uniform policy meant that certain circumstances went unheeded.

Charges of malicious treatment persisted and public support for an amnesty grew: the Amnesty Association was founded on 28 June 1869 to work towards the release of all Fenian prisoners, an object its President claimed, 'on which the whole heart of Ireland was so earnestly and passionately set'.<sup>11</sup> This object was partly realised when in March of the same year 49 prisoners were released, which only incited the Association to a forceful restatement of its original end. A demonstration was organised on 24 Oct. 1869, composed of political bodies of the left and others connected to Irish nationalism, whose size, according to one estimate was put at 100,000. Pending the release of the prisoners, humane treatment was demanded of the prison authorities. Further credence was given when a pamphlet was detailing the treatment accorded to the Fenian prisoners, whereby 'an external semblance of civilisation is preserved, but only as a mask for a system of degradation and cruelty rarely paralleled'. The prisoner went on to claim that

commissioners have dealt freely in *suppressio veri* and *suggestio falsi* in order to blacken our characters and justify cruelties practised on us by our gaolers. Most men could make the worse appear the better by suppression of truth and suggestion of falsehood.<sup>12</sup>

The government of Gladstone succumbed to such pressure and established another Commission to see if the Fenian prisoners had suffered any hardships beyond the normal lot of a convict. They did uncover particular instances of ill-treatment, especially in the case of O' Donovan Rossa, who

stated that, amongst other injustices, his 'letters had been suppressed because they contained accounts of his and his companions' ill treatment'.<sup>13</sup> It was found that in some cases the prison authorities had relaxed regulations to pre-empt such ferment as was now occurring, but this obviously affected the policy of uniform discipline and stirred resentment amongst the ranks of ordinary prisoners. The Commission was forced to conclude that

We cannot be insensible to the difficulty, not always unattended with danger, of allowing exceptional indulgences to a few individuals in the midst of a larger prison population....We are led to the conclusion that the difficulties attendant on the location and treatment of political offenders may perhaps be most readily and effectually overcome by setting apart, from time to time, a detached portion of some convict prison for prisoners of this class.<sup>14</sup>

Two members of the committee dissented from this recommendation, with one adding that 'a conspicuous and successful defiance of prison life is in itself a scandal of prison life, and a most dangerous example to other prisoners'. Clearly the fear was that other groups of prisoners might grapple for special status which would have put paid to the notion of a uniformly administered prison service. It was obviously an issue which was vexing and dividing all those concerned with the smooth running of the convict prisons and those at the coal-face were seeking for some means to allay the perennial disquiet concerning the convict prisons.



The chairman of the Directors of Convict prisons, in a minute about the Devon Commission, expressed his worry about the 'agitation kept up by their [the Fenians'] friends in Parliament and the Press, which was carried on largely by means of unscrupulous assertions of misconduct and ill-treatment on the part of the prison authorities'. He further noted that as a 'result of these long continued attacks the officers themselves became somewhat demoralised and afraid to do their duty'. As a solution to this seemingly intractable problem, Du Cane mooted the possibility that such prisoners 'be treated under special regulations of less penal character than those which apply to ordinary prisoners'.<sup>15</sup>

In the meantime, there was no let-up in the campaign to have the prisoners granted amnesty and pressure seemed to have paid off when Gladstone announced a conditional release, the condition being that they go into exile. It seemed to be the only way of cutting the Gordian knot of how to treat some prisoners differently in a uniformly administered regime. After this amnesty of Jan. 1871, public demonstrations continued to gain the release of those prisoners still remaining in prison, highlighted by a series of meetings in Ireland in the Autumn of 1873, with some gatherings numbering in the hundreds of thousands. However all these efforts came to nothing when the Conservatives came to power in the election of 1874, and they refused to do anything for the Irish prisoners. Though they gained the support of the Irish parliamentary party, in truth public interest was on the wane since those who were seen to be most deserving of release had

already obtained it and those remaining had been convicted of serious crimes involving weapons and endangering life.

In the midst of trying to secure some manner of agreed conduct toward the Fenian prisoners, Parnell called for the establishment of independent inspection of the convict prisons since he believed that this was the only way to safeguard the prisoners contained behind the walls and restrain the conduct of prison officials. Was such a call warranted apart from the obvious infractions in the case of a few Fenians?

The Fenians were the most vocal in railing against what they perceived as abuses of power, though they were not the only ones to so suffer. A petition could be sent to the Home Secretary but most of these had to pass before the scrutiny of the governor who could block any unfavourable reports. It was stipulated that a director would visit a prison every month to whom the prisoners could complain but this was regarded by many of the inmates as a only providing a facade of propriety. Even if the Director was conscientious, it was alleged that the prison officials put everything in order for his visit so that nothing amiss would be apparent.

Many questions were raised concerning these matters during a sitting of another (the Kimberly) Commission, the origins of which are not clearly evident though it seems to have owed its existence, in part, to a sense of public unease over the prison regime. This uneasiness can be partly attributed to the active hectoring of the Irish politicians but also as a result of an inevitable seepage of information in spite of the censorious regime that was in operation. Prisoners could not be held in perpetual confinement



and some would inevitably disseminate their experiences once they had been released, and there were various personnel (especially the clergy) involved in the day-to-day running of the prisons who were dissatisfied with the direction of policy and who leaked information to interested parties.

All this came out in the evidence given to the committee who were, however, sceptical of unattributable information; they did express their concern about the lack of an inspectorate for the convict prisons that was independent of those concerned with policy decisions and 'without a strong interest in the success of the department'. The committee members thought it normal that a suspicion could arise 'in the public mind, that such officers would have a natural tendency to hush up....complaints rather than bring them forward'.<sup>16</sup> It was to allay such suspicions that it was concluded that

it would conduce to public confidence in the system and would be a valuable safeguard against many abuses creeping into it, if means were taken to secure the inspection of prisons from time to time by persons appointed by the Government, but unpaid and unconnected with the prisons department.<sup>17</sup>

The prison directors protested that such a move would bring about organisational confusion since it would lead to a form of 'dual authority' notwithstanding the fact that it was evident that this inspectorate would have no powers of interference but simply the opportunity to investigate and report any suspicions to the Home Secretary, a copy of the situation which obtained in the local prisons. Like their counter-parts in the local prisons, they seemed to have had very little effect upon the prison service. The



general tenor of complaint against them, by bodies like the Howard Association, was that they approached their task with little real diligence or scrupulousness and made no great effort to distance themselves from the prison service. This failure to exercise any independent control upon the convict prisons would be replicated in the case of the local prisons, as we shall now see.

## 4.2 Local troubles

The strategy that was adopted in regard to the local prisons was different from the handling of affairs in the convict prisons for the very simple reason that the prison commissioners' influence and control were contested. Whereas in the convict prisons there was a policy of secrecy and suppression of incriminating information, the commissioners could not trust the local operatives to do such a thing; therefore control had to be taken out of their hands to ensure that variations would become a thing of the past.

The Carnavon Committee had expressed its hope that there would be some move towards uniformity in matters penal; direct control from the centre was not envisaged, rather magistrates would be offered grants-in-aid to conform to Home Office standards, whilst being free to refuse and beat their own path. Several inspectors disagreed with the report's recommendations, particularly with a nationally enforced uniform dietary scale and a statutory definition of hard labour, as any variation would involve an application to Parliament, an objection with which the Home Secretary concurred. A bill, springing from the report, was drawn up.

Parliament itself was unwilling to invest in the Home Secretary the wide discretionary powers which were needed to implement a uniform policy, once it was admitted that hard labour could not be defined in law. The objections of the Bill's opponents were noted as Grey confessed that if the gaols were to be left in local hands then 'you must be prepared to sacrifice something of that absolute uniformity which it may be desirable to attain'; equally, if sentencing was to remain a province of the local judges, then 'you must submit to some inequalities and anomalies'.<sup>18</sup> The problem was resolved with a new Bill the following year which offered some broad based regulations, from which the local justices could choose and would be able to supplement them with variations of their own, as long as these were not at variance with the already outlined principles.

Everyone was not satisfied with the 1865 Bill: Du Cane argued that the Home Office could do little with recalcitrant local authorities. The threat of withholding money existed but very often this was circumvented by what was believed to be special pleading; even if this was ignored and the local prison had to be closed, there was no means to oblige another gaol to accept these displaced prisoners. Furthermore, he contended that there was a surplus supply of prisons but the pride of various local regions prevented them from amalgamating. If all the local prisons came under national control, then major savings in expenditure could accrue. It was opportune that Disraeli's conservatives had been elected, borne along on the pledge of reducing the burden of rates-payers, so that the offer of economising on the

prisons whilst improving the quality of administration proved to be tantalising.

To the surprise of all, many local authorities accepted the transfer of power and closure of some gaols quite willingly though occasionally there were struggles as 'the gaols were a major source of protest. All of this was dressed up in the clothes of civic dignity, self-sufficiency and tradition, but trade employment and political interests were the truer sinews of protest'.<sup>19</sup>

It had been promised that £100,000 a year could be expected but when this failed to materialise quickly it was remarked in Parliament that 'there was really no saving at all; neither was there any compensation for the great loss of independence and general supervision which the counties formerly exercised in the management of prisons'.<sup>20</sup> It was pleaded that it was impossible to draw comparisons between local and national accounting, and that once-off transitional costs would be involved in the changeover.

The fragility of the finances made it all the more imperative that the prison service not be subjected to keen scrutiny so that scandals concerning excessive punishment and disquiet amidst prisoners would either have to be eliminated or hushed up.

Prior to nationalisation, penal discipline had been a topic for widespread debate among the thousands of magistrates who operated the local prisons. It had, in addition, attracted the attention of lay commentators such as reform organisations and journalists, while the annual reports from the Inspectors of Prisons publicly catalogued prisons' strengths and weaknesses. Penal



administration was very nearly an open book. With an average daily population of some twenty thousand, an annual turnover exceeding one hundred and fifty thousand, and a large establishment of staff, opportunities for mishaps and complaints were omnipresent. These could easily be fanned into campaigns of public criticisms which could undermine the Commissioners' still fragile reputation. For this reason.... Du Cane sought a high level of confidentiality in his operations. And since he controlled access to the prisons, he succeeded in interposing a near impenetrable barrier between prisons and the community.<sup>21</sup>

The prison commissioner explicitly committed themselves to a reduction in the number of prisoners since they believed that a more uniform mode of managing prisons should bring with it a reduction in the number of punishments.<sup>22</sup> Very soon after nationalisation, it was claimed that there had been a drop in punishment from 60,000 to 42,000, but often punishments were simply omitted from the records, or combined and recorded as a single punishment and the forfeiture of marks was also passed over.

The notion of education within local prisons received very little support from the commissioners and provoked clashes with the many local justices who had pioneered various educational schemes. The biggest change was that of cellular instruction, which drastically reduced the time the teacher could devote to the pupils as compared to the previous system of teaching in a class: one committee estimated it as a drop from three hours a week to six minutes. It is interesting to note how this issue would be resolved; 'Du

Cane resorted to what was now his favourite device for getting his own way- a departmental committee to which he made the nominations and dictated terms of reference',<sup>23</sup> in short a perfect example of what Lukes called two-dimensional power, organising the agenda so that issues inimical to one's own concerns are never broached. Thus whilst it had the appearance of deferring to a neutral arbiter, in reality the pitch was skewed before the other party ever even appeared on the field. The outcome reflected how the committee had been established and a report was produced which proved congenial to the Commissioners' desires. Only the absolutely ignorant would enjoy communal teaching and once a minimum standard had been reached, the prisoner was consigned to cellular instruction.

This outcome enraged many visiting committees and at a general meeting one representative fulminated that 'what we want now is a good reformatory influence. There was something like a reformatory influence before the prisons were handed over to the Government. At the present moment there is nothing of the sort. It is all strict discipline which is carried out. Discipline is very good; but we want more than that. What is the good of sending a man to prison unless it is to reform him?'<sup>24</sup> The Visiting Committees could, in fact, do very little since control had passed out of their hands and they were met with arguments about the need to maintain discipline.

How did the magistrates react in general to their emaciated role? Originally, a form of dual control was proposed whereby the justices would

have powers of patronage over the minor posts within the prisons. This was discounted after objections from several quarters, the principal one being that this would encourage cronyism but also it might well have placed, within the prisons, two distinct groups, each marked by its own esprit de corps and ideas on how the prison should be run. In the end, the 1877 nationalisation Act stripped justices of any executive powers that they had and relegated them to the role of inspection, for which they would be responsible to the Home Office, not to the Quarter Sessions.

It was up to the individual visiting committees themselves to make the best of their circumscribed role; the commissioners were still fearful lest something untoward be discovered and brought to light. Du Cane suggested that rather than the visiting justices reviewing all the records themselves, they should pass on any suspicions concerning violations to the Home Secretary. This was an attempt to rig the system so that no serious abuses would ever be uncovered: how would the justices ever glean any trace of abuses if the records were never open to them and even if they did and informed the Home Secretary, he would presumably order the Commissioners to investigate the matter, for which they had been responsible. A reassurance was issued that the justices would be facilitated as much as possible, but in the obvious hope that they would not rock the boat too much and impede the executive authority of the governor.

Prior to nationalisation, the magistrates had the power of admitting whoever they liked into the prisons, but the commissioners insisted that this indiscriminate stream of visitors should cease. A complaint was raised



concerning the reporting of floggings and executions; it was believed that people could only have become privy to these events through the local justices allowing them to visit the prisons; to prevent these reports, such visits were stopped. Although the privilege was continued in a truncated form, the committees had to be judicious in its exercise, since the Home Secretary threatened to remove this power from them if the prison administration was discomfited.

The visiting committees had been trumpeted as a safe-guard against abuses; it was thought that ill-treatment would become easier to conceal once the national government had taken control of the prisons. However in many cases, they proved ill-equipped to adapt to their new role and failed to prevent serious abuses, even deaths, from happening in their jurisdiction. Though some were uncovered, it was usually left to an exculpatory committee to apportion out the blame.

What had been striking before nationalisation was the timidity with which the Home Office confronted the local justices; how had there been such a striking turnaround in their relationship? The justices were, in the words of a contemporary, 'men of large property and great influence'.<sup>25</sup> Though they were united in their repugnance of the new form of prison administration, they were in several minds as to what should be done about it. Some hoped to regain former powers and past glories, others wished to dedicate themselves to attacking specific policies with which they disagreed through concerted, detailed criticism and still more had no agenda other than

antipathy. Generally, reactions swung between an outright rejection of nationalisation and an acceptance of a critical position within this framework.

McConville writes that there were two possibilities facing this conference of committees: 'they could have chosen to see themselves as prison welfare committees; or they could have followed the path that had been laid down for them, and acted as inspectors and reporters'. As to the first option, there were already societies catering for the discharged prisoner and the visiting committees were eventually absorbed into them: 'concern with the released prisoner had swallowed concern with the prisoner in captivity'.<sup>26</sup> Regarding the second, it seems that the justices were too concerned with gaining some sort of executive position to deign to take up the role of inspection. They were urged to by several parties, since nationalisation had granted the commissioners control over the inspectors, a scenario which the Howard had complained was very objectionable. The justices had been sidelined and believed that any critical advice would be ignored and could not begin to accommodate and devote themselves to their new role.

It was not simply a matter of the resources or influence that the local justices could or could not fail to summon up which explains their failure to effectively challenge the new prison regime; it was their inability to become unified in anything other than in a negative way, which facilitated their fall from a sphere of influence and precluded them from regaining any significant role within the new administration.

### 4.3 Special cases

Many would concede that change is often not engineered but rather comes about as an unintended consequence of two parties seeking to pursue their own distinct agendas without consideration for the aims of others. Yet this would still be too 'activist' a version of history if this is believed to be the sole engine of change. Often, change can be pressed upon one party simply through the existence of another, without this latter group entertaining any thought of change, perhaps without realising that they form a distinct category of people who have certain common characteristics and perhaps interests. The most obvious example today would be the effect of pensioners who through very little concerted action are wreaking the most profound changes upon the state as action is undertaken to cater for this expanding legion of people.

Similarly, change was effected upon the prison service through the existence of both children and women, both of whom, it was thought, could not be subjected to the full rigours of a regime of uniform deterrence. This represented the greatest challenge that faced the prison service: how to cope with the need for specialisation (different treatment for different categories of people) whilst preserving some degree of uniformity throughout the service? The simplest way was to deny that these categories actually existed, which was the tactic employed in the case of the Fenians and that in turn was fiercely contested by them and their supporters. It was much more difficult to argue that there was no difference between adult male prisoners and women and children. This is not to say that there was any



great amelioration of their conditions but two differing policies can be made out which were deployed to deal with these respective groups.

Prison officials tried to hive off the females from the rest of the prison population :

females could be separated from the criminal mass, since even the most hardened and troublesome amongst them could easily (and comfortably) be seen as victims of vice, drink and aberrant femininity, rather than as calculating criminals. In need of a firm hand, certainly, but their nature and condition made them unsuitable for the male regime of regimentation and pervasive bodily discomfort and exertion. This reasoning made it both equitable and scientific to deal with female prisoners more as medical than legal cases.<sup>27</sup>

This policy of concentration was easiest in urban areas, since there would have existed several prisons so that one could have been set aside for its exclusive use by females. When this was impossible, women were said to suffer due to the lack of provision of educational facilities, which generally required a minimum number of people. Women were, however, excused from heavy labour and could not be whipped and the use of chains to restrain them was forbidden.

Generally this policy of separation seemed to have worked and the women were not badly treated. Testimonies as to their conditions was sometimes hard to come since their right to a lady visitor was often resented and restricted by the prison authorities but common sensibility saw

that they did not unduly suffer. It was thanks to the paternalistic outlook which generally disadvantaged women, that female inmates experienced less of the rigours of penal life than their male counterparts.

In some ways, children represented less of a problem since the agreed upon policy was one of exclusion: following nationalisation, the imprisonment of juveniles fell by more than 50%. Reformatory and industrial schools had been established, the former being intended for definitely criminal juveniles and the latter for vagrant children, though it was becoming increasingly difficult to hold to this distinction. Probation for first offenders, fines and sureties were also in use in an effort to guarantee that children would not have to be sent to prison. However, prison was still witness to a substantial influx of children; sometimes fines and sureties could not be provided, some children were repeat offenders and so could not be placed upon probation and there existed a stipulation that prior to being sent to a reformatory, a child had to spend 10 days in prison.

Their presence posed a major obstacle to the objective of deterrence: since they could not be treated as severely as adults what was to be done with them? The major initiative was separation, whether within the prison or removal to another. There were other changes but they were incidental toward any potential transformation of the regime. The prison commissioners were clear that their presence represented an unwelcome preoccupation which they could well do without.

There were other cases in which rules were relaxed in order to take into account special circumstances though this was a precarious business: occasionally there would occur a case in which it was felt that the law had been too harshly applied and equity demanded that there be some intervention against the processes of the law. Yet if there was a lapse from the strict letter of the law at one time, there may well have been a demand as to why a precedent had not been set. Such was the case with the Transvaal Raiders to whom a light sentence was handed down (first class misdemeanant) of which only the first part had to be served and then a Royal Pardon would come into effect. After this, the Irish demanded to know why their countrymen could not be accorded similar leniency in what seemed a similar situation. The prisons authorities were loath to interfere with the operations of the judiciary and only did so with extreme reluctance but - as in all the cases reviewed above - 'by heading off a public sense of outrage, [they] helped preserve support for the severe penal treatment of the residuum'.<sup>28</sup> They were well aware that by introducing a special category for one group of people might have had reverberations as another group demanded why regulations were being contravened in one instance and not another.

#### **4.4 Extending uniformity**

It should not be supposed that the aim of any group is to extend their views as widely as possible. Though it may seem that it was the intent of the prison directorate to ceaselessly extend control, this was not its prime



objective. It was rather the reduction in disparities of punishment between different prisons and the accentuation of deterrence as the principle behind punishment. I have shown that the first did not necessarily entail centralisation but the second did, since those manning the local prisons could not be relied upon to place enough emphasis upon deterrence. Thus it was not the situational logic of what I termed the necessary complementarity, the connection between punishment and justice, which induced centralisation and further extensive control by the government but the prominence bestowed upon deterrence. We shall see that pursuing the links between punishment and justice (or equity) led to a reduction in the numbers of prisoners under the control of the prison authorities, once all prisons were answerable to the Prison Directors.

Discontent had rumbled on throughout the century over perceived anomalies in sentencing with the main grievances being reserved for the gap in punishments between offences against the person and property which reflected the outlook of the presiding magistrates. This brewing unease was fortified by the entrance of the Chairman of the Prison Directorate into this conflict, when he outlined his discontent concerning the anomalies within the sentencing system and particularly the lack of any intermediate sentence between a maximum of two years imprisonment and five years penal servitude. It was estimated that savings of over £43,000 a year could be collected if the average length of sentence fell by one year. He further enjoined a more careful study of the principles of sentencing policy which

he believed could be achieved through greater collaboration between the executive and judiciary.

These claims were rubbished from one quarter precisely for this reason that 'the Secretary of State would be appearing to dictate how they [the judiciary] could exercise their discretion'.<sup>29</sup> The Home Secretary himself weighed in stating that one of the objects of the centralisation of the local prisons was 'to secure greater uniformity in the administration of prison discipline and consequently greater equality and identity in the punishment of crime'. There still remained a 'greater difficulty, viz. the means of securing somewhat more of harmony and uniformity in the extent of punishment, and the amount of sentences pronounced in similar cases'. A potential solution was that 'general rules... subject of course to the necessary exceptions in particular cases...should be safely laid down so as to lead to greater uniformity in practice'.<sup>30</sup>

Again the judges bucked under the thought of being circumscribed by some sort of statutory legislation. They raised the familiar objection that there was little to choose between abiding in utterly rigid fashion to a code and exercising some sort of discretion in applying the law. There was no way to foresee all the particular circumstances that would enter into the consideration of individual cases so that judges would have to be allowed some leeway. It was a oft-used defence that the shocking divergences failed to appear because all judges were bound by common norms and that such affinity could not be replicated by any code.

It was obvious that attempts to tackle the lack of systematisation in sentencing would incur opposition but it was also clear that failure to probe this matter would be to leave a task half-completed, a link noted by the Home Secretary but also by others. This connection was one of mutual benefit since the ideas were equally complimentary which is not to say that their implementation was any easy matter. Paradoxically if this connection was to be accepted, it would have the effect of cutting the reach of the prison service since inmates would dwell under its influence for a shorter period of time. Perhaps this should not be such a surprise, but following recent theorists who have contended that the prison is an important locus of social control, it is necessary to undercut the contention that those in charge of prisons sought to ceaselessly extend their influence. One of the great objections to this account is that it posits the inculcation of certain *moeurs* within prisoners as the primary end of the prison, regardless of any other considerations. This was not the greatest area of concern for the prison service in the period that we are investigating, intent as they were on making the system as efficient and economical as possible.

The social effect of the ideational relationship that we called a necessary complementary was to encourage the promulgation and reproduction of the connection between these ideas. This is because few deny the obviousness and utility of the connection and so all get to work on ensuring that it comes to fruition. But did not the attempt to forge further connections between punishment and justice invoke opposition from the judiciary and so introduce divisiveness where there was none before and so disproves this



thesis concerning the social effects of a necessary complementary? The judiciary certainly objected to statutory legislation affecting their decision-making but they did not disagree with this connection but only argued that their present mode of sentencing represented the most appropriate fit between these two ideas and that common binding sentiments, not elaborate and abstruse legislation, would ensure that the principles of equity would prevail in sentencing. They did not reject the 'fit' between punishment and justice but claimed to have substantiated it as best as possible; this did not prevent them, at a meeting in 1892, from recommending the establishment of a court to review sentences which were thought to be 'wrong' and so procure greater uniformity in sentencing. This came to nothing as it was thought the problem of wrongful convictions was more serious but the judges were reluctant to interfere with the workings of the jury system. In 1901 a committee of Queen's Bench judges met and though they were convinced that the purported disparity was much exaggerated, they did attempt to draw up certain standards of punishment which would be applicable unless some special circumstances applied since it would be convenient and of public advantage. It has been said of them that they were 'remarkably moderate when compared with current practice. Never before had the judges of England made such a concerted effort to lay the foundation for a consistent sentencing policy. It might have been expected that their memorandum would have been made known to the quarter sessions, the chronic breeding ground of inequalities, but it never reached them'.<sup>31</sup>

Whatever about the success of this procedure, the judges tried to do more in

the eyes of the public to achieve greater uniformity, thus accepting the necessary complementary of punishment and justice. So it is evident that even the judiciary had accepted the rectitude of the connection between equal punishment and were simply disagreeing about the most favourable means to ensure that this link was clinched.

#### **4.5 Problems within**

The prison authority had proven to both a resourceful and powerful body; it had not come through the period of deterrence without mishap, but at the beginning of the 1880s it seemed to have weathered various squalls and was sailing serenely on. Crime would continually drop throughout this decade, which made the closure of uneconomic prisons all the easier and gave the impression that the boon of savings was being substantiated. Most of the Fenians had been released, there was no great uproar over the treatment of women and fewer youthful offenders were entering the prisons. There was little agitation on the part of the prisoners, so many of the elements which might have introduced unpredictability or the need for specialisation had been excluded or were already being catered for. The prison staff did wish to see their conditions improved but they had no disagreement with the broad thrust of policy. Even a body such as the Howard Association did not offer a radical critique of the prison service; it had guardedly welcomed the nationalisation of the local prisons and approved of the emphasis upon separation in penal practice. It did clash occasionally with the prison authorities but offered no alternatives to



prevailing penal practices; its tacit acceptance of the status quo provoked the Humanitarian League to denounce it as no longer being a progressive but a reactionary institution, affording no aid to novel ideas of a reformatory nature. Why then did there occur, 15 years later, a call for the whole ideological approach of the prison service to be changed?

I alluded earlier to the problems inherent in the tactic of concentrating power in the grasp of those select few who could be trusted. As the remit of the Prison Commissioners spread, more and more gaols came under their control and had to be administered. This transferred the problem from the localities to the centre but did not change its nature. Civil servants from the Home Office were concerned about the administration of the prisons following nationalisation and it was not definite that they would share the same beliefs as the Commissioners; nor were they to be as pliable as the Commissioners would have liked. One commentator writes that 'by the early 1890s, there was a larger number of persons both at a senior level in the civil service and in parliamentary and government circles who would be sympathetic towards emergent ideas about the reform of criminals'.<sup>32</sup> There is no guarantee that such a group would be sympathetic toward the emphasis placed on deterrence and it is an open question which side they will support. It should not be presumed that such attempts to amass power, through centralisation, will always succeed.

A succession of cases arose, where civil servants queried the harshness of a prisoner's circumstances and wondered if they could be alleviated: refusals to allow a prisoner be moved to a gaol nearer his family, delay in



examining a petition of complaint from a prisoner, close scrutiny of the circumstances under which an inmate died. These are all examples in which the prison commissioners were being subjected to scrutiny of a type which they had never experienced before, and they were slow to adapt to the new environment.

When the Howard Association submitted a critique of various aspects of the prison service, it was treated with contempt by Du Cane, who memoed that 'this little peddling Assoc.[iation] is like the frog which tried to persuade itself and its neighbours that it was a bull- but it has considerable powers for mischief'. This was rebutted by a senior civil servant who noted that 'it is very difficult for any outsider to criticise successfully what goes on inside Prison Walls. He is sure to make mistakes from imperfect information & generalise too freely. Nevertheless if the criticisms are offered bona fide....they should be respectfully considered, & occasionally they may be found to be of use'.<sup>33</sup>

What made the chairman so apprehensive was that the criticism touched upon staffing matters, an area where he had accumulated total control to himself and did not even consult his fellow commissioners, which one confessed later was very anomalous. Once the civil servants had been alerted to this anomaly, efforts were made to curb this dubious power of patronage. There was a continuing tussle with the chairman of the commissioners, unwilling to surrender this prerogative, but eventually ministerial privilege won out. A complaint was minuted that 'they [the Commissioners] are unable to understand why, after the many years in which they have conducted these

matters to the satisfaction of successive Secretaries of State....they should now be repeatedly reminded of their position'.<sup>34</sup> Benign neglect had ensured that vacancies were filled by personnel which fitted his criteria, a policy which many had come to find peculiar. An increasingly large organisation found it difficult to function according to arbitrary whims or unstated assumptions; what the mentality of the civil servants demanded, was a set of clearly defined regulations which articulated the particular powers and responsibilities of everyone.

Change was not brought about solely by a cadre imbued with beliefs, distinct from those formerly held in the prison service; their mentality also made them more receptive to external criticisms of the prison service. Some had always been sceptical of the possible results that might be achieved by a severely punitive regime and several articles in the *Daily Chronicle* testified to this lack of faith in the prisons. The author of these articles was almost certainly influenced by two other individuals, one of whom had spent some time in prison and the other had been an assistant chaplain at Wandsworth. The articles condemned the prison service for being inflexible, militaristic in outlook, inefficient, overcrowded and destructive of whatever character the criminals possessed upon entering prison. These articles, in turn, drew both approbation for their realistic depiction of life within the prison service and condemnation for its ill-founded arguments and personal abuse in the press. Other articles appeared, drawing attention to defects in the prison system, like its failure to prevent recidivism and the Humanitarian

League called for a full-scale review of the criminal law and a full and impartial inquiry into the system of prison government.

The subsequent committee that was established enjoys the privilege of being the most cited in the literature of British prisons and its recommendations are often represented as a pivotal point for the service. Its terms of enquiry were loosely connected and susceptible to a extensive interpretation which reinforces the idea that it came about not due to departmental foresight but as a result of perceived public pressure.

Whether with fore- or hindsight, the committee were unanimous on one general issue: that the prison service would have to dedicate more care towards the individual. Several aims flowed from this undertaking :

1. Deterrence and reform were to be 'primary and concurrent objects' of the prison service.
2. In order to facilitate the introduction of reformation, uniformity on treatment would have to concede some ground toward specialisation
3. Criminals would be split up into similar categories so that specialised treatment could be devoted to each, and to prevent a malign development in first offenders.

The 'contumacious' - the habitual criminals and drunkards and the weak-minded would be dealt with in a special fashion.

4. There would be less emphasis upon separation and more training carried out under controlled association.

It has been argued that the evidence received before the committee in no way justified these vastly significant and influential conclusions. Be that as



it may, the committee members obviously believed that there was some warrant for their departure from the classical model of deterrence; what were the underpinnings of this attitude and how strong were they?

There has been considerable puzzlement over the decision to convert the basis of the prison system which relied almost exclusively on deterrence to that of a mixed system incorporating both deterrence and reform, especially since it had been as apparent success. The call for a more deterrent regime had received a spur in the decade after 1855 following the abolition of transportation and the subsequent proliferation of stories about convicts roaming the streets on ticket-of-leave licences, searching for victims. This fear did not faithfully reflect reality and there had been a downward trend in crime relative to population since the mid 1840s. This is no retrospective judgement; by the 1870s contemporaries proclaimed their satisfaction that 'there never was, in any nation of which we have a history, a time in which life and property were so secure as they are at present in England'.<sup>35</sup> This diminution of crime was accompanied by a drop in the number of committals to prison: the numbers in the convict prisons had dropped by more than half, from 12,000 in 1871 to under 5,000 in 1894; likewise there had been a fall of more than a third in the numbers of people in local prisons by 1894. Of the crime that was committed, much of it was not serious: 85% of people brought to court were guilty of theft, most of it petty and only 4% of convictions were for offences against the person.

All of the above measures are consonant with an increased rate of recidivism, of crime being increasingly confined to a small group of people,

which was interpreted by some as a sign of success. The aim of penal policy had been one of general deterrence and if prisons were being swollen by a larger proportion of recidivists than before, then less and less people were being tempted to commit first offences. Obviously, this still leaves unanswered the question what was to be done with those people who could not forebear from committing crimes. Advocates of a deterrent regime were unable to offer an answer to a problem which seemed to be immune to the deterrent effects of the prison regime.

At the inception of the period of deterrence, all the cards seemed to be stacked in the favour of the prison authorities; it was subjecting independent prisons to increasing control, chiefly through insisting that certain standards be met and offering grants-in-aid for those prisons unable to cope financially, so binding them ever closer to the political establishment. The prison service was not an entity which existed to serve vital needs such as education, which did affect economic well-being; the only group which did negotiate in such a manner was many trade union bodies, whose profits could have been undercut if the prisoners had been allowed to engage in productive labour. The service demanded of it was more of a negative nature, that it control its inmates and ensure that they did not hinder the law-abiding citizen. If this goal was met, most people were not terribly interested in agitating for change. Most people did not include the prisoners themselves, yet even this should not be treated as an undifferentiated group; different groups of prisoners affected the prison service in different ways.



Change did not occur quickly since there is an obvious structural incompatibility between running a uniform prison service and being able to respond to diverse needs, most often posed by the prisoners themselves. The slow pace of change very often means that frustrations will be built up as the political structure fails to respond to demands and change will occur after a critical point has been reached and frustrations boil over. It remains to be seen whether and how the structural incompatibility would be overcome.

It should be noted that the structural arrangements of both centralisation and decentralisation bring their own respective problems, so that one is not clearly superior to the other. In this chapter we have noted some of the tensions inherent in a policy of centralisation, namely an inability to respond quickly and adequately to internal exigencies and to changes in the surrounding environment. It might seem that by loosening the reins and ceding some control to the units that made up the penal system, these problems could be overcome but this ushers some novel problems. Among these is the difficulty of retaining coherence among the parts so that they run in harmony and do not hinder each other's operations. This can only be done by the political centre retaining enough control to dictate the pace of change. Thus the unarticulated aim of the prison commission was to permit enough specialisation to deal with the different categories of prisoners but not enough to threaten the overall systemic shape of the prison service. The revisionist history is caught out by this structural incompatibility: either it admits that specialisation and hence reform carried the day but this would



be to concede that the reformatory program was the unintended result of the interaction of many different groups or else they argue that the government retained enough control to check some reformatory programs. As we will see, events were not so clear cut either way.

I argued, at the outset, that once the link between punishment, as undertaken by a state agency, and justice was seen to be a necessary one, then the conclusion drawn was that there could not exist great anomalies between various practices of punishment. This was one of the chief conclusions of the Carnavon committee which wished to see less regional variation; later, much was made of the potential benefits that would accrue if control was exercised from the centre such as efficiency and economy. An assumption existed that once a uniform regime was in place the effectiveness of deterrence would increase.

It is probably impossible to estimate the influence of the prison service upon the crime rate, but certainly some of the credit was apportioned to it. Like any intellectual enterprise, attention is first fixed upon resolvable problems, according to the accepted axioms, and only later does attention turn to the more recalcitrant problems. The policy of uniform deterrence, operating according to the principles of classical justice, which were based upon the notion of free will and the capability of every individual to abstain from an illegal act so that all criminals were equally responsible for their actions, seemed less able to cope with a solid mass of recidivists. It was believed that it was not a matter of changing personnel but of changing the whole approach of the prison service since 'the retention of a

compact mass of habitual criminals in our midst is a growing stain on our civilisation'.<sup>36</sup>

The recommendations of the Gladstone committee represented an awareness of a pause in the amelioration of crime but also a lack of certainty about how to resolve this problem. There was a reluctance to embrace all the implications of the new science of criminal anthropology. How much of a departure would adoption of this novel science from the classical principles of justice mean and what would be the effect of endorsing the findings of criminal anthropology?

## 5. Avenues of enquiry

As we have seen, there had already been concessions made to both expediency and sensibility, by partly withdrawing from the model of uniform deterrence: women, children, Fenians, first class misdemeanants and members of the armed services did not share a common experience with the great number of the inhabitants of the prisons. During this period, advances were being made in science which would advance stronger reasons for discriminating amongst prisoners than political pressures or public sensibility.

In 1859, Charles Darwin's *Origin of the Species* was published and soon after its ideas were being put to use in other fields of research. Francis Galton published *Hereditary Genius* in 1869 and fifteen years later *Inquiry into Human Faculty*. These two works furthered the idea that human characteristics are largely inherited and the former work suggested interfering with evolution to improve the stock of humankind; the latter work spoke of the criminal and his various pernicious qualities. Social Darwinism, of this kind, represented a great challenge to previous evangelical approaches used in prisons, because it seemed that human nature could not be changed for the better, through any sort of argument or inducement, since human characteristics had been largely determined at birth.

This was the era of such sciences as phrenology which attempted to read off the characteristics of an individual from the shape of a person's skull; everyone was not equal for 'in the case of persons possessing the lowest



class of brains, we are presented with beings whose tendencies to crime are naturally very strong and whose powers of moral guidance and restraint are very feeble'<sup>1</sup>. This soon led to the (in)famous measurement of criminals' skulls within prisons to ascertain if there was any discernible difference between criminals and so-called ordinary citizens. Speculation soon arose whether the criminal not only possessed a distinct head type but whether he might not represent a completely different type of individual altogether, a Spenciarian throwback who had failed to evolve at the same rate as the rest of society.

### 5.1 The Birth of Criminology

The development of a 'science' like criminology depicts in classic fashion the process of what we would expect from a contingent complementarity. The archetypal lone scientist is suddenly struck by a moment of inspiration and ploughs ahead in an unthought-of direction, following up on his intuition and hunches. Thus Lombroso, speaking of his inspiration as he was conducting a post-mortem examination and opening his skull, said that 'this was not merely an idea, but a revelation. At the sight of that skull I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal - an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals'.<sup>2</sup> There had certainly been precursors who had speculated upon the possible links between mental and physical states, but Lombroso was undoubtedly helped by a more receptive intellectual climate

which had recently been exposed to Darwin's hypotheses about man's connections with the animal kingdom. Intellectual development is not always a matter of an affinity of ideas but may be helped or hindered by structural factors; in this case it is difficult to envisage the rise of criminology, without there having been a large prison population on which observations and experiments could be based. Once the possibility, that criminal behaviour might not rest upon some entity labelled 'free will', but upon something like a physical state of affairs had been mooted, the opportunity was there for people to indulge their wildest hypotheses, unconstrained by any logical connections to other ideas. This is not to say that there may not be allegiances and prejudices at the social level, which may militate against such innovation and cause people to shrink back from entertaining uncomfortable thoughts.

By looking at the changes in the editions one can see how rapidly a new body of thought can accumulate, if not totally assimilate information. The first edition of *L' Uomo delinquente* was published in 1876 totalling 252 pages but twenty years later, it had evolved into a three volume work of over 1,900 pages. New measurements and theories all helped to modify and expand his original thoughts upon the atavistic criminal type. In his later work the degeneracy of the criminal was stressed and the connections between the criminal, the insane and the epileptic were explored.

Lombroso believed he could recognise the criminal 'type' through 'the small skull, the developed jaw...the retreating forehead, the voluminous ears...low cranial capacity.... thickness of the bones of the skull'<sup>3</sup> as well as



various animal characteristics and believed this type represented a special sub-species. Lombroso had come to see that there were many characteristics shared by criminals which could not be explained by atavism so he argued that 'the fusion of criminality with epilepsy and with moral insanity could explain the purely pathological and non-atavistic phenomenon in the delinquent'.<sup>4</sup> If progress seems blocked, there is always a temptation to build up ever more fanciful theories to explain away anomalies. Lombroso believed that the 'facts, regardless of their apparent unrelatedness at the moment, would eventually accumulate into an emergent theory of universal applicability'<sup>5</sup> but there is always the suspicion that some theory might be arbitrarily invoked to impose some sort of order upon this relentless fact-gathering. This sort of hasty repair-work might seem attractive in the short term, arresting as it does the flow of awkward anomalies which threaten to swamp the incipient theory but fails as a long-term remedy: the affinities might be superficial and prove to be fleeting, under any kind of controlled scrutiny. This was the course of events, as later criminologists examined Lombroso's work objecting, to his way of 'perceiving intuitive analogies, [as] his lively imagination led him to falsely to regard them as identities'.<sup>6</sup> Perhaps the most telling criticism was his failure to provide definitions of the categories he was investigating and the lack of any control groups, with which to compare his results. All this is a common occurrence in the consolidation of a new school of thought whereby only the survival of the intellectually rigorous is assured. Often the following wave of researchers are not remembered for their positive formulations but for their negative



injunctions as they display scant disregard for the findings of the founding fathers of their disciplines and so prevent their ever being anything like a canon, which sets the standard for generations to come. This is not to say that the institutionalisation will always be accompanied by a debunking process; Ferri, for example, expanded the classification of criminals to encompass many more subjects than Lombroso's original categories.

Thus, Gabriel Tarde observed three patterns of repetitive behaviour in the activity of criminals and formulated three laws of imitation which he believed accounted for these regularities. Hardly anyone today would consider these worth disinterring but his criticisms of Lombroso are noted by all. He dismantled Lombroso's theories by noting that primitive societies were often law-abiding and moderate in their behaviour. The analogy between the savage and criminal was invalid; the criminal could not be compared to the madman since the criminal often thought in a logical fashion; and the criminal could not be reckoned to be an epileptic since fewer than 5% of prisoners had such a condition.

Garofalo asserted that 'what criminal anthropology really lacks....is convincing proof that a given character of the skull or skeleton is found more often among criminals than among persons presumably honest'. He then tried to make good this deficiency by supplying his own theory of a moral anomaly, which shows itself in a person possessing no altruistic qualities, whose selfish actions offend against the moral sentiments of pity and probity, without which no society could function and are indeed common to all. He believed that this moral anomaly was passed on by

hereditary transmission, 'established by unimpeachable evidence'<sup>7</sup>, but was always unable to unearth the precise physical mechanism of this anomaly.

What we witness here is the situational logic of the contingent complementarity: a proliferation of knowledge-items and a consequent specialisation, in many different directions, as people concentrate on proving the validity of their own particular theories. Even if the accumulation of previous theories yields little of positive value, this is not necessarily a dead-end, since it may offer hints to further paths of research. There are no fixed boundaries which circumscribe the legitimate area of investigation; once it is admitted that factors external to the individual may be influential in the cause of crime, there are a bewildering variety of factors (social, genetic, climatic etc.) which can fit this role, in isolation or in combination. Furthermore each of the possible variables can be pared down to give ever-finer distinctions, all of which is fully intelligible only to the resident expert. This lack of prohibition on investigation is perhaps the greatest stimulant to the increase in variety and specialisation that is a hallmark of this complex of ideas.

If all these theorists were divided by what might serve as a reliable indicator of a criminal, they were united by a lack of faith in prisons and they had even less time for any reformatory approaches within them. For Lombroso the knowledge that there existed born criminals steeled him against any pity; as his daughter wrote, reviewing his work: 'imprisonment does not serve to intimidate instinctive criminals, [since they are congenitally inclined to this sort of activity] still less is it a means of rehabilitation'.<sup>8</sup>



For Garafalo, the existence of the criminal signified a failure to adapt to the level of behaviour demanded by society, and just as in the animal kingdom, the price to be paid for this lack of malleability was to be elimination, if not by death then by removal to an overseas colony. Ferri did not endorse such measures but certainly advocated that criminals should be assigned to one of the five classes he had discovered, to ascertain the proper measure of punishment, among which were indeterminate sentences.

This new science dealt a far more severe critique to the assumptions of the classical school on the level of sentencing; it would have involved a complete uprooting of these classical premises. Ferri offers an example of the frustration felt at the stultifying effects of the classical school, based upon the presumption that every infraction is the result of freely willed choice and that this liberty is applicable in all situations, and its increasing detachment from reality: 'now the classical school, which sprang from the marvellous little work of Beccaria, has completed its historic cycle. It has yielded all it could, and writers of the present day who still cling to it can only recast the old material. The youngest of them, indeed, are condemned to a sort of Byzantine discussion of scholastic formulas and to a sterile process of scientific rumination'.<sup>9</sup>

One of the greatest obstacles towards understanding the true nature of criminality was the notion of free will which meant that the 'classical school rested on a fiction... The fiction consisted in this; in believing that before the same action each person had an equal degree of liberty'.<sup>10</sup> Criminology would dispel this fiction and in so doing would destroy 'the



initial equality, i.e. the judicial equality of punishment....the idea that, for the same crime, it is necessary to have an identical punishment in nature and duration is no longer really sustainable'.<sup>11</sup> Instead of adapting the punishment to fit the crime with the result that many criminals received roughly the same sentence for a similar offence, criminology would adapt punishment to suit the individual offender. Out would go any notion of proportion between offence and penalty and of uniformity of punishment across a range of offenders. It was believed that the principles of classical justice were a chimera, a piece of indulgent metaphysics which were no longer sustainable, after scientific investigation revealed the true basis of criminality, and were proving to be of diminishing utility.

Garland believes that this new science was united not only by its opposition to the classical status quo but also by the set of measures which were elaborated to deal with criminals;

criminality was thus to be eliminated, either by prevention, reformation or extinction. This triple strategy required not only procedures of assessment and classification, which could identify offenders as corrigible or incorrigible, but also a diversity of dispositions, sanctions and techniques to implement these objectives. Thus we find that a major demand of the criminologists was for an extended repertoire of penal sanctions and institutions, including juvenile reformatories, preventive detention institutions, institutions for inebriates, for the feeble-minded, a variety of prison-regimes, forms of supervision,

conditional liberation, indeterminate sentences and pre-delinquent institutions.

He finds that such measures were endorsed by a large number of newly-accredited criminologists and wonders 'what was the basis of this consistency? How could this new discourse establish such stability and uniformity in such a small space of time and over such a large international terrain'. He adduces two possible reasons:

- (1) Simple repetition of various works
- (2) The social implications if these prognoses were accepted

His first point seems to be that criminology was not bound by any ideational constraints, i.e. a hypothesis concerning criminal behaviour was not tied to any one explanation. This allowed various explanations to be put forth, many of which were collected together by individual criminologists, with little thought as to any orderly combination. Since criminality was a pressing social problem 'its investigators were committed more to that solution than to any single or coherent theory of human behaviour'.<sup>12</sup> Garland has derived the opposite conclusion from what I would expect from the logic of the contingent complementary, but this is explained by his conflation of the ideational and social. Certainly there existed a widespread desire to modify criminal behaviour but this did not translate into a single diagnosis and prognosis. Many hypotheses were ill-adapted for mutual accommodation but this is to be expected in the onset of a new specialism; more rigorous questioning ensues, as more and more people are attracted to

this field and reflect critically on established findings, contributing to cultural elaboration.

As theory became more elaborate, importance had to be attached to the various possibilities; the development of criminological theory cannot be pictured as a choice between two potential explanations, the environment (and how many variables are included in this term) and individual constitution, because then a 'mono-causal dispute of substance thus became a mere questioning of priorities within a multi-factorial approach'.<sup>13</sup> These priorities had to be weighed and assessed relative to each other, for how else could it be estimated how effective various treatments might be? Were people genetically determined to be criminals or could upbringing have a decisive effect upon dispositions? Could such putative genetic traits be passed onto offspring so that perhaps society should intervene to prevent such unions issuing fruit? If social conditions are perhaps partially responsible for moulding criminal behaviour, how much effort and resources should be devoted towards alleviating these? Once it had been mooted that criminal behaviour was not wholly due to the individual's free-will, it opened a huge range of possibilities which could claim some sort of causal role; how heavily each of these was emphasised, influenced greatly the subsequent action designed to alleviate the problem and so a vague eclecticism was of little value. Tarde was well aware of both the tension which had arisen between the existing criminal law and the proposals of criminology, 'their flagrant disagreements with the new ideas of morality which are beginning to come to light' and the 'contradiction between these



ideas among themselves'. He castigated other criminologists for having passed over the causative possibilities of 'social factors' and criticised them for having come up with a definitive criminal type since 'crime is a crossroad of hidden ways coming from diametrically opposite points...Thus there must...a very large number of physical indications, often contradictory, which would disclose propensities to crime to an eye capable of unlimited penetration' and so there 'are as many different criminal types as there are anthropologists'.<sup>14</sup> Tarde clearly perceived the effects of the situational logic of the contingent complementarity and the proliferation of explanatory models that it encourages.

The second reason why it is believed that criminology gained such a wide hearing so quickly, was that action based upon its recommendations could only be carried through by the state and so was supported by agencies and groups who stood to gain from increased state intervention: 'criminology implied an elevation in the status and power of the likes of prison executives, forensic scientists, psychiatrists and other penological experts. It widened the fields of medicine, psychiatry and even sociology to cover what had been previously a judicial domain, and sought to effect a shift of power away from the judiciary and towards a non-legal executive staff'.<sup>15</sup> There is a presumption here that individuals will always try to extend their control and power and that the reasons for which they do so are a mask for gaining such advancement; the Foucauldian affinities are clear as are its weaknesses, since it makes ideas subservient to material

interests. That some members of these professions might be doubtful of this new science, on account of its theoretical basis, is never entertained.

## 8.2. The English Reception of Criminological Ideas

No longer is it the notion of free will which divides the dutiful citizen from the wilful offender; in some unspecified manner the criminal has been caused to offend. The criminal's background must be investigated more precisely to ascertain precisely what this mode of determination could have been, to arrive at a classification of the criminal. Having gained this knowledge, an exact punishment can be derived, which will be used to eliminate this criminal behaviour. Hence the profusion of eugenics which sprang from a belief in crime being hereditary.

Whether the English prison authorities were able to countenance such unpalatable conclusions, there is little sign that these findings had made any impact in England; in 1890 Havelock Ellis complained that 'in the last fifteen years there is no scientific work in criminal anthropology to be recorded' and that 'as an exact science [it] is yet unknown in England'.<sup>16</sup> He set great store by the efficacy of the indeterminate sentence and he contended that 'the key to the failure of the prison, and a chief clue in its reform, lies in the system of administering definite and predetermined sentences by judges who being ignorant of the nature of the individual before them, and therefore of the effect of the sentence upon him, and of its justice, are really incompetent to judge'.<sup>17</sup> This was a constant refrain of those who wished to reform the prisons, that consideration would have to be

given to detaining the individual criminal within a prison or some sort of detention centre, for as long as was necessary for treatment to take effect, though it was not usually allied with such stark criticism of the judiciary's expertise.

Here we are able to witness the inchoate phenomenon of what was termed a contingent complementarity, the drawing of connections between ideas which are neither opposed to each other nor logically connected but which are mutually complementary to a degree. Punishment was thought to be necessarily connected to the idea of justice, of equal treatment for all for those who had committed the same offence. Criminology now threatened to uncouple this linkage as it suggested that punishment should be adapted to particular circumstances to be rendered more effective.

Since I have argued that it was incumbent upon government to provide a similar system of punishment for all offenders, we would expect this innovation to be resisted. It was a measure not only of the faith, that all those involved in the penal system had in the rectitude of the underlying ideational support (indicating no serious splits within the prison service), that they felt no need to reply to these proposals, but, more importantly, that the relationship between a necessary and contingent complementarity needs activation by some social group. Although the relationship is one of opposition, it does not inexorably impose itself upon people.

It is an empirical question, whether these ideas will first manifest themselves through personnel connected with a particular regime, or from a source wholly removed from it. As Havelock Ellis had pointed out, within



the circle of English prison administrators, there was no trace of the intellectual ferment which had coursed through many other European countries, as a result of this new path of enquiry, developed over twenty years. This was no accident, as English officials had made themselves conspicuously absent from various associations and meetings at which the implications of this new research were drawn out and discussed. This ensured that nobody would be exposed to the hostile stock of ideas which were circulating and be able to formulate a criticism of the prevailing ethos within the prison system. What such a tactic can accomplish is to cut off the means of formulating such criticism but it cannot stifle the actual dissatisfaction felt by some, even if it has been totally muted. It erects a wall to prevent hostile ideas penetrating but like many exercises of power may actually accentuate the frustration felt, and may entice people to scale this wall to seek out a means of criticism. This is, in fact, what Havelock Ellis did, attending the various conferences in a private capacity.

The opposition will usually first manifest itself in the form of a few discontented subordinates (since those at the top have most to lose by questioning the basis of their regime), who slowly begin to articulate an antagonistic program to the dominant ideas of the time. Recall that Morrison was a prison chaplain who gained his inspiration to uncover a more effective penal program, after dwelling on the perceived failings of the received model in a steadfastly deterrent regime. To quell such dissent, if actively articulated, it is no longer sufficient to simply ignore it; this is usually only done if there is no internal dissent. Discrediting tactics will

most often be used and these will not always be confined to rigorous intellectual probing; very often they will consist of abuse, ridicule and the elaboration of tenuously connected consequences, all designed to make these nascent ideas as unattractive as possible.

It is an open question what the disaffected do now but if they seem to be making little headway within the system they may well opt for a quick exit, having received such an unenthusiastic reception. Those whose task it is to oversee the smooth implementation of the 'dominant ideology' may well be relieved to see these marginals disappear, since troublesome elements have been removed and the task of ideational contamination has been lessened. These marginals will no longer be working as double agents, they will have declared their true colours even if they only know what they are against, being unsure as to where their true allegiance lies. Defects of the previously dominant ideology spurred them to seek alternatives, and if a credible substitute is still lacking, it will be up to them to build one up.

What happens next is dependent upon a host of empirical factors: how successful these marginals are in establishing a credible program which can challenge its rival, which has become discredited in their eyes, how many of the previously unaligned can be enticed to take an interest in this burgeoning contest, and how seriously the newly-founded rival is taken by those who still command a dominant position. Each of these are presented in consecutive fashion since the success of one will affect that of the following.

The reaction of those, whose reign has been rudely challenged, is dependent upon a number of factors also: did the outflow of the discontented provoke a crisis of confidence or a sigh of relief, how radical a reshuffle would the incorporation of this new knowledge involve? If it would completely undercut what had been the main ideational support (such as the conjoint notions of free will and responsibility which were at the heart of the classical notion of punishment), then alternatives will be subject to derision. This may not be so effective now that the marginals no longer occupy a place within the regime so that official reprimands will not work. Pouring cold water on unwelcome ideas may work if their holders do occupy a marginal role within society but will be less powerful if their backers number among the powerful. I will examine in the following chapters the fate of this nascent theory and whether it proved hardy enough to withstand the trials of social life and whether it found a protective guardian.



## 6. Striking a balance ?

The period following the Gladstone report is crucial to revisionist histories, for given its emphasis upon reform, this allows them to argue that reform and related treatments achieved a hitherto unobtained prominence in penal policies. Reformatory institutions became an adjunct to the existing penal institutions and relieved them of categories of prisoners who had proven refractory to change and subjects the prisoners to either 'normalisation'- making them act in accordance with the requirements of good citizenship, correction - detaining them on an indeterminate sentence until their conduct is satisfactory, or segregation - this covers all those categories that cannot be assumed by the 1st two policies. Each backs the other up so if a prisoner cannot be treated according to one policy another one awaits.

I will question how thoroughly such policies were implemented given the necessary contradiction between reform and deterrence. In particular I will query whether each category of prisoner could be treated according to reformatory criteria or whether these had to be balanced by some measure of deterrence. To install some measure of reform into the penal establishments, the commissioners had to rely on many groups which did not share their beliefs totally, yet these do not feature very strongly in the revisionist account. I wrote in Chapter 1 that vested interests, which institutional structures distribute, are ignored by the power/knowledge formula; I will show how various groups, such as the Church Missionaries,

the prison officers and others, disagreed with the extent of reform desired by the prison commissioners, yet such divisiveness never features in the revisionist case. Their resistance is a crucial factor in how extensive reforms became.

If prison officials had accumulated a great deal of control, there still remained the problem of dealing with those categories of prisoners which had proven resistant to a regime of deterrence, and resolving the dilemma of reconciling proportionate punishment for a particular crime with proposals for indefinite confinement, and, simultaneously, balancing reform and deterrence. It was not simply a matter of identifying a particular group (though this was in itself an enormous task) and subjecting these to a reformatory program and dealing with the vast mass of the prison populace as before, for the 'whether to reform and to what extent?' was posed by the categorisation of each group. The prison commission wished to initiate a slow, steady pace of reform, distancing itself from what it saw as untenable policies from abroad. What could unsettle this cautious approach was if the attempted reconciliation between deterrence and reform was deemed by some to be insufficient; an assault which could come from adherents of both ideas if they believed that their convictions were being placed in the shade. There does not have to be a set of ready-made alternative ideas, waiting to be brandished by the discontented, merely dissatisfaction with the direction of existing policies, for existing ideas to be questioned. The prison commission were also attempting to introduce a degree of specialisation within the penal

system, which meant involving many more personnel and bodies than before, in the administration of the uniform service. Control over these new agents will not be as tight as was the case with personnel who held positions within the convict service; preceptual edicts to the effect that certain policies should be observed, regardless of any misgivings, will not be effective with these more autonomous agents; they might well have their own ideas how the prison service should be run and more importantly, the possibility of making their beliefs count.

Penal strategies in the first half of the 20th century underwent a great change, not always apparent to the people involved in the prisons, as many policies other than sending offenders to prison emerged. There was a shift of emphasis away from sending people to prison for short periods of time (usually less than a month) and also for long periods of time, with many sentences of penal servitude sticking to the statutory minimum of three years, and toward such policies as putting offenders on probation, a great increase in the payment of fines, and particular institutions being developed for single categories of offenders. I will now trace the development of these strategies and the problems encountered therein, keeping in mind the necessity of maintaining a balance between deterrence and reform and the principles of justice, uniformity and equality of treatment.

### **6.1 Reactions to the Gladstone Committee**

The Gladstone report received little fanfare in the national press as there was a general election in the offing and it was not a bone of contention



between the Conservatives and Liberals. The Commissioners' response was important since it would be an indication of their sentiments about a more reformatory regime and the lengths they would go to facilitate its establishment.

A call had been issued for prisoners to be employed in labour of a more useful kind and the commissioners agreed to the abolition of the treadmill and crank. They insisted that penal labour of a deterrent nature was essential, ceding the necessity of dispensing with the symbols of the previous deterrent regime, but still wished to retain their efficacy. They recognised the need for special treatment of juveniles but said little about women. Habitual offenders were divided into two categories, petty and serious, and, for the latter, they wished for longer sentences and closer supervision upon release. Only if this was proven to have failed, would they countenance detention for indefinite periods. They rejected any new powers for inspectors, including a proposal that inspectors should report directly to the Home Secretary. They made a plea for the reformatory nature of the prison system, despite its lack of notable accoutrements which would strike those unacquainted with the prisons; they would rely on a 'quiet and unostentatious method of orderly government, i.e. on discipline'. Not a so-called military discipline which fails to respect the humanity of men but which 'insists on order and obedience and cleanliness and industry as a primary and essential condition of imprisonment'; this would aid those weak-minded individuals whose failings were 'principally due to moral instability, ensuing from the absence of those controlling and steadying influences

which are implied in the phrase prison discipline'. If this were borne in mind, the commissioners were sure that 'the English system will compare favourably with any foreign or colonial system'.<sup>1</sup>

The Home Office and prison commissioners were unsure whether they should press ahead with a comprehensive Bill, attempting to incorporate reform within prison administration. This would have required a complicated Bill and there seemed to be little will for such an undertaking; it was then that Home Office officials hit upon the idea of removing most of the prison rules from statutory legislation and making them subject to the discretion of the Home Secretary. This practically excluded Parliament from any input into rule-making and increased the power of the officials.

The proposed change was partly justified by the supposed ease with which the prison service could adapt to changes in public sentiment, rather than being chained to outmoded rules. The sought-after flexibility would be vested in the Home Secretary, dealing with offenders according to their nature. In Parliament, unwilling to disturb circumspect temperaments, the Home Secretary spoke of 'careful and cautious experiments'. The *Daily Chronicle*, which had first levelled charges at the prison service, attacked the Home Secretary for his circumspect approach, using information which Oscar Wilde had gathered during a period in prison. The campaign was intended to stir up Liberal support, the Irish needing no encouragement to wade in and rebuke the prison authorities for their inhumanity and lack of sensitivity to the individual prisoner's circumstances.

A great number of liberals refused to see the Bill in this light, preferring instead to see it as a 'compromise between the present state of things and the demands made by those who advocate sweeping alterations'.<sup>2</sup> The Tories were at one with the Liberals and offered very little criticism but rather suggestions. Despite promises at committee stage to provide some of the desired reforms most of these were withdrawn. The reformers had long been crying out for flexibility and the Bill seemed to promise this; most politicians could not conceive it as being a retrograde step for civil servants to have the power to change rules. Parliament had ceded control of the prisons and it could only veto rules but not instigate proposals itself.

## 6.2 Possibilities for Change

Did the new avenues of enquiry, opened up by the development of criminology, make any inroads on the existing conception of punishment within the penal system? The questions raised by criminological investigations were taken up not only by mavericks such as Ellis and Morrison, who were sceptical of the existing modes of punishment, but also by personnel who worked in the prison service but were far less questioning of the basis of punishment. It would be an error to believe that their support for the prison service was purely as a result of intimidation by the prison authorities, lending support to the view that ideational elaboration is a result of socio-cultural meddling. Many personnel did not seem to be convinced by the explanations offered for asserting the existence of a criminal type and for revising the criminal law: one claimed that 'there are



no theories of criminal anthropology so well-grounded and exact as to justify their introduction into a revised criminal law'.<sup>3</sup> It was accepted that environmental circumstances could play a part, but these could only be admitted as extenuating circumstances, mitigating the guilt of the individual but not absolving it. There was a recurrent fear that if the principles of criminology were accepted, then there would no longer be a basis for punishing offenders and respect for the law would be weakened.

If there was a rejection of a wholesale acceptance of criminology, perhaps piecemeal it was a different story. The notion of an individual who was predisposed to crime seemed to have been confirmed by the phenomenon of recidivism, of individuals who were being continually committed to prison but on whom it had little effect. The prison commission, at the turn of the century, had made clear their desire to tackle this problem by means of some kind of reformatory regime, but to improve on such vagueness, more had to be uncovered concerning the basis and reasons for criminality.

Tests on a large scale were to be carried out by Charles Goring with over 3,000 samples. Physical measurements and tests of mental ability were to be taken, the intention being that a solid collection of data would dictate to theory what, if any, was the origin of criminality. He likened criminology to an 'organised system of self-evident confusion whose parallel is only to be found in the astrology, alchemy and other credulities of the Middle Ages....so criminology has been a superstitious study, based upon a preconceived notion of the criminality of criminals as found in prisons'.<sup>4</sup>

The examination was a laborious process, encompassing over 96 variables that were to be tested for a correlation with criminal habits. Having compared criminals with various control groups, the conclusion reached was that there was no such thing as a physical criminal type. The report downplayed the effect of environmental circumstances lending them only a 'trifling' influence. What could be dogmatically asserted was that 'the criminal is differentiated by inferior stature, by defective intelligence and to some extent by his anti-social proclivities; but apart from these broad differences, there are no physical, mental or moral characteristics peculiar to inmates of English prisons'.<sup>5</sup> While its reception on the Continent was a decisive setback for the school of criminal anthropology, in Britain it evoked a mixed reception. Some, always convinced of the futility of criminology, could not see why such an elaborate examination had to occur at all. Others were critical of his estimation of hereditary influences, that crime was 'inherited at much the same rate as are the other physical and mental qualities and pathological conditions in man',<sup>6</sup> which seemed to suggest a new sort of determinism and the relative downplaying of environmental influences. The acceptance of the supposition that some are 'predestined to a criminal career', unmodified by any effective influences after birth, would 'call in question the whole responsibility of any person guilty of an anti-social act' and 'the doctor would usurp the function of the judge, and the bankruptcy of the old penal system would be complete'.<sup>7</sup>

Such a tactic is familiar to us as scare-mongering, but familiarity should not occlude what is being done. This labelling is a form of what Lukes



calls 3rd dimensional power, an attempt to structure the intellectual environment in which debate takes place. By placing certain ideas beyond the pale or indicating that an 'appalling vista' will open up if they are accepted, the motives and reactions of people are being moulded into rejecting the unwelcome theoretical developments. If the existing state of affairs is seen as the natural way of doing things, it is all the more effective, because it seems so reasonable. But it will only be effective if the group advocating the new ideas are a small minority, without many resources of their own; it depends on the great majority of the relevant population unquestioningly rejecting the alternative, hence the attempts to induce this by pointing out the most extreme and unwelcome consequences.

Goring's report was more welcome for its rejection of Lombroso- in truth, this was flogging a dead horse - than for its advancement of inferior intellect and physique transmitted through criminal 'stocks' and advocacy of techniques favoured by the eugenics movement to deal with this problem. Prison medical staff were reluctant to extend the definition of irresponsibility beyond the insane and severely mentally ill and instead sought to stress 'social and environmental forces' which could either confirm or convert any such inherent pre-disposition. In the words of Cyril Burt, speaking about young offenders, delinquency was 'the outcome of a concurrence of subversive factors: it needs many coats of paint to pitch a thing black'<sup>8</sup>; it could not be ascribed to one single factor. A distinction was drawn between mental deficiency and backwardness, the argument being that most criminals fell into the latter category because of unfavourable environmental conditions



especially the family. Hence the efforts in many supposedly reformatory institutions to create an environment conducive toward developing a law-abiding temperament.

### 6.3 Dealing with Recidivists

The chairman of the prison commissioners, Ruggles-Brise, was well aware of how a uniformly administered prison service had failed to deal with all groups of delinquents adequately, and that it had failed to cope with recidivism. He did not wish to treat recidivists to a more lax sentence nor did he want to impose sentences that were completely disproportionate to the offences. He proposed that sentences for the most recent offence had to be served out and any sentence of preventive detention could only be as long as the legal maximum time for the offence. Admitting that these periods of extended detention might be more relaxed than common penal servitude, convicts were to be transferred to a separate location, run under a more liberal regime. The judges articulated their apprehension about introducing such a departure from customary penal measures but still wished to do something about those individuals who would not abstain from crime. They suggested a stay, amounting to 75% of the offender's sentence, in the more relaxed penal colony. A formula was devised by which an offender would serve some time (not less than 25% of his total sentence) in penal servitude and the rest in a habitual offender division, known as the 'dual-track' scheme, and if the offender had a previous conviction then he must

serve five years in this section of the prison system. This proposal was attacked as the new regime did not offer anything radically different from what penal servitude offered and it failed to define adequately what a habitual criminal was, a lacuna which was to bedevil all attempts to cope with this problem.

Despite the nebulous notion of a habitual criminal it was believed that those who were subjected to preventive detention should live under a relaxed regime which, due to its length, would still prove to be a deterrent. It was essential that something be seen to be done about recidivism, otherwise the proposed reforms, throughout the prison service, would be jeopardised. In 1908 Gladstone tried to revive Ruggles-Brise's combination of penal servitude and he distinguished between two types of habitual offender: those who had deliberately chosen crime as a way of life- the professional criminal- and those who fell into it due to some kind of deficiency- the petty offender who was more of a nuisance. The former would be taken to a special colony for indeterminate detention, having served at least three years penal servitude. This 'dual-track' scheme was attacked by those who believed that the preliminary part of the sentence in penal servitude was unnecessary and an offender, who was given a long sentence, would be seen to have paid his dues through his sentence of penal servitude and preventive detention would fall into disuse. Other objections came from Liberals and Irish nationalists who had always distrusted the prison officials and did not believe that a prisoner should only be released at the behest of the Home Secretary, supported by the 'pseudo scientists with broken down

reputations like Lombroso's'.<sup>9</sup> This had some force and the Home Secretary protested that the new colonies would include a reformatory element, indicating the degree of confusion that existed with regard to what exactly was a habitual criminal. Was he to be simply contained indefinitely or should he be treated with release in mind? The government withdrew this proposed prerogative of release upon the say-so of the Home Secretary and allowed the Higher Courts to impose a maximum sentence of ten years and a minimum of five, with an Advisory Board free to choose a release date any time between these two limits.

The first preventive detention centre was opened on March 5th, 1912 and the prison commissioners tried to make it different from the normal prison regime. There were three grades- disciplinary, ordinary and special - the first most akin to the conditions of normal penal servitude for the refractory prisoners. Those in the other two grades could work at trades, earning a small gratuity which they could spend in the canteen; the prisoners were allowed to associate at mealtimes and join in recreational activities after meal-times. Those nearing release were placed in parole cabins which were independent units of accommodation possessing their own lavatories and kitchens. After two years, prisoners were allowed 'relaxations of a literary and social character' namely tobacco and newspapers. It is not clear whether all these conditions were all part of a clear plan to alter the attitude of prisoners or were simply a sop to enable them to ignore their extended sentences. The prison officials were well aware that they had departed from



normal procedure and they did not wish the public to know too much, as it would 'provoke criticism and needless suggestions for alterations in detail'.<sup>10</sup>

Surprisingly, agitation came from the prisoners themselves and the authorities quickly responded by sending the ring-leaders back to convict prisons. The commissioners made an effort to uncover the nature of their grievances and found that many prisoners believed that the term of penal servitude sufficed for punishment and that Camp Hill would be a place of detention. They thus demanded some of the conditions of a free life, liberty excepted. The prisoners had no interest in maintaining any semblance of deterrence and pushed the argument to its logical conclusion, namely that if conditions of deterrence were not to have a hold over them then purely reformatory policies should be put in place. Of course, it was still an open question as to what exactly constituted a reformatory regime and did not necessarily (a conceptual necessity) mean a painless regime, but would have meant that severely punitive policies, implemented without consideration of the prisoners' opinions, were discounted. The prisoners had been quick to note the lack of fore-thought which had gone into the planning of the regime and exploited it. The Home Office willingly granted more lax conditions, exasperated by opposition which was preventing them from establishing a regime based purely on containment, among which were the judiciary who opted for the minimum period (3 years penal servitude and 5 years preventive detention), as often as possible. The population of Camp Hill fell over a period of time as the judiciary were too suspicious of ideas which so patently clashed with the principles of classical justice, namely that

it involved double sentencing and dispensing a punishment that might be out of all proportion to the crime.

From the beginning the prison officials were involved in a dilemma - if the so-called habitual criminals were to be placed within a penal colony straightaway, the prison authorities could well be accused of treating them too lightly without subjecting them to a regime that consisted of deterrent programs, so offending against the balance of deterrence and reform; conversely, if they were to serve some time in penal servitude and after that term had expired were moved onto a detention centre, this would be seen as double counting so failing to adhere to the principle of proportionate punishment. The prison commissioners were aware of this dilemma from the outset but had move no nearer a resolution by the time that judicial distrust and neglect had pushed preventive detention into disuse.

#### **6.4 Saving the women and children ?**

Women, as we saw earlier, posed problems for a regime that was designed to inflict deterrent measures on men; women were less able to withstand these rigours and a *de facto* compromise was worked out, whereby they were treated with less severity. From the point of view of operational convenience, it was a happy coincidence that women who ended up in prison were increasingly seen as conjoint with the problem of habitual drunkenness.

Drunkenness was held to be either analogous to a disease or a vice. The latter conception had the advantage of holding out a cure, after a lengthy

period of detention. Support was adduced from the existence of inebriate asylums in America, which were purported to have a success rate of 66%; on closer inspection, it was found that people entered these Homes voluntarily and were from the upper echelons of society. They were not intended for recalcitrant drunkards and people were free to leave whenever they wished and so told the English little of how a system of compulsory confinement could work.

Bills were introduced in 1872 and 1873 with the intention of detaining drunkards after they were sober and ensuring that they could be released, without succumbing to drink. The Bills were defeated for fear of interfering too much with individual freedom, of compelling people to be sober. The only Bill that could be passed into law was one stripped of its coercive overtones- it merely licensed the setting up and inspection of private retreats which patients would enter voluntarily. They had to prove both their readiness to give up their liberty and their ability to pay. It was applicable only to the affluent few and given the lack of compulsive powers, many habitual drunkards were unwilling to invite stigma by announcing themselves to be dependent upon alcohol.

There were about 250,000 commitments of people to prison on the charge of drunkenness every year, yet many were convinced of the uselessness of committing such people to prison for such short periods of time, the average sentence being eight days. The prison not only failed to cure these people but was believed to be a boon to their drinking habits and long-term inebriety, since it gave the individual a chance to recuperate



and then launched her back upon society to continue her bouts of drinking. Ideas were mooted about setting up specialised establishments and detaining the respective individuals for a period up to two years but some of the judiciary were reluctant to see people being consigned to such places, without being guilty of a criminal offence. Financial considerations also intruded: the government was willing to finance only one reformatory for inebriates, with the rest having to come from the finances of local government.

The Inebriates Act of 1898 did not mention non-criminal drunkards but it did provide for those people who offended against public decency but not safety, and who had been convicted three times in the year before the current offence. Such people could be sent to a certified asylum (financed by a local authority), for a period not exceeding three years. Criminal drunkards would be dispatched to a State inebriate reformatory for the same length of time. The local authorities were to be given a small weekly sum to help them meet the running costs of the asylum. As in the preventive detention regime, it was unclear whether these habitual drunkards would be subjected to a program of reform or whether the socially inconvenient, such as tramps and prostitutes, would be swept up and incapacitated. The local authorities believed this was a duty of the penal authorities and, in any case, very few made use of them; only 35 out of 400 authorities sent inebriates to reformatories. This reluctance to burden the local rates unduly was coupled with judicial reluctance to hand down a sentence, which appeared to treat drunkards more severely than ordinary criminals. The judges rarely

committed to the State reformatories, simply because they failed to view the consumption of alcohol as a sufficient reason; instead offenders were sentenced to a customary sentence.

The State reformatories, which finally opened in 1902, three years after the first certified reformatory, were ending up as a receptacle for the most recalcitrant cases, with a 2:1 male female ratio, who would not submit to the regimes in the certified reformatories. It was no wonder that the relevant Inspector spoke of a pervading hopelessness. There was more optimism in the certified reformatories, where it was hoped that, by being surrounded by an atmosphere of tranquillity, the women (in 1904 91% of admissions to such places were female) would be induced to model themselves upon an ideal of contented domesticity, though there also existed an unspoken policy of segregation. Implicit in such a program was a rejection of the notion that drunkenness was anything approaching a disease and that the subjects would voluntarily lift themselves out of their condition if properly persuaded; 'yet the moralising purposes of the regime sat uncomfortably alongside persisting conceptions of inebriety as a disease...at Farmfield the women were incongruously referred to as patients. The regime was clearly incoherent, both in its initial premises and in the means adopted to carry them out'.<sup>11</sup> These beliefs were also being challenged by the reality obtaining in the State reformatory, where the nature of the regime was being distorted by the infractious behaviour of the inmates and Ruggles-Brise complained that they should be sent back to the district prisons. There was little supervision upon release with the result that many relapsed into



alcoholism; in a survey of one reformatory's first 600 patients, over 80% had become inebriate again. The inspector of the reformatories lamented that it was 'proving extremely unfortunate that the word reformatory was ever selected to apply to institutions intended for the reception of committed inebriates'.<sup>12</sup> The local authorities reiterated his pessimism, by trying to restrict access to those who were deemed reformable and disregarding those thought beyond aid, despite Home Office pleas to the contrary.

A review was established and all difficulties were attributed to administrative failures and the Home Office still relied on a moral conception of inebriety. They believed that such faults could be rectified by the individuals themselves, when placed in a proper atmosphere for the necessary amount of time, which could only be provided in a specialised institution. They were aware that only a tiny percentage of people were being sentenced on account of drunkenness and that there still were a great number of crimes being committed by inebriates. They recommended an expansion of the system, with the State assuming control of all necessary expenditure, magistrates assuming the power to send people to the reformatories and expanding the definition of an inebriate- a person who habitually takes or uses any intoxicating thing or things. The government was unwilling to assume financial control but was also unwilling to compel local authorities, by statute, to finance the reformatories partly. Increasingly many inebriates were being viewed as mentally defective so that these seemingly feeble-minded people would be shuttled to mental institutions which were the responsibility of the state. The London County Council,



which was running the majority of inebriate reformatories, was growing increasingly disenchanted with them and in December 1913 refused to have anything more to do with them. By 1921 all the reformatories had closed down.

Children were another category which were ill-suited to being assigned a place in a punitive prison system; since the middle of the nineteenth century many had been siphoned off to a place in the reformatory or industrial schools, where a proper environment would try to instil, in the children and juveniles, restraint and self-control. As I said in Chapter 6, this policy was not wholly successful as there were still a large number of 12-16 year olds (approx. 1400) and a greater number of 16-21 year olds (13,000 young men and 3000 young females in 1896) within the prisons.

The prison commission continued the policy of the previous regime by encouraging the idea that prison was no place for children under 16, so their number continued to drop. A further step was taken when it was proposed that courts intended solely for children be instituted, so children would be further dissociated from criminals. The concept of the juvenile court, which emerged in the Children Act 1908, provided that the hearing would take place in a location separate from where normal criminal proceedings took place. The Act prohibited the committal of children to prison and there were restrictions placed upon sending juveniles to prisons.

The magistrates were extremely slow in adapting criminal procedures for children so that after WWI it 'was still rare for a young offender to be

confronted by magistrates with a sympathetic and informed insight into the mind of the child, by a courtroom divested of the trappings and personnel of an ordinary police court, and by a simple, informal and elastic procedure'.<sup>13</sup> The struggle to institute a court, geared solely to divining the problems and needs of the child, would continue for a decade but did not reach a clear-cut resolution. The Home Office wished to diagnose the treatment necessary for the young offender but also stress the gravity of the offence and the responsibility of the offender for his or her crime.

If children and juveniles were not to be sent to prison, then the reformatories and industrial schools beckoned. These had lost their pioneering spirit over time and seemed to have fallen in with the dull regimentation, typical of the earlier regime. Since they were largely voluntarily funded, there was financial pressure to make the inmates work at trades that would be profitable to the institution and not necessarily useful to the juvenile in the outside world. Straitened financial circumstances also meant that the required staff could not be recruited. Departmental reports frowned at the practices within but were interrupted by the Great War. As in the local prisons, variety was the bane of any coherent program and the Howard League concurred in the bleak assessment of the state of the schools, advocating state control. This was seen to be the only feasible solution to the existing problem of providing 'a satisfactory service of high quality through a series of semi-independent units imperfectly controlled from the centre'.<sup>14</sup>



The Home Office balked at such a responsibility but did agree to meet half of the maintenance cost of the schools, with the local authorities making up the rest, voluntary subscriptions having slowed to a trickle. This lent greater weight to the recommendations of the government inspector who hoped to rationalise some of the activities of the schools. The schools' failure to adapt themselves speedily enough to the new notions of treatment meant that, for a time, committals were dropping off, as magistrates were reluctant to impose a period of long-term detention (three years being the minimum period) upon young offenders. Probation was increasingly being seen as an attractive alternative and the local authorities applauded and supported less costly measures, such as this. The option of a shorter period of confinement had been raised but there were fears that it would be chosen for financial expediency and that there would be insufficient time for training. Officials were adamant that the sentence was meant to be a period of training and so had to be out of proportion to the offence: 'the idea of the tariff for the offence or of making the punishment fit the crime dies hard; but it must be uprooted if reformation rather than punishment is to be as it should be for young offenders- the guiding principle'.<sup>15</sup>

The Home Office were alarmed at the meagre numbers being committed to the schools, especially when they were enjoying newly-won success in their treatment of juveniles. Some juveniles were thought to be better suited to a period in the schools than being granted a probation order. This induced the Home Office to encourage the courts to look with favour upon the schools by shortening the maximum length of time, a decision which



some were reluctant to hand over to the courts. Thus the official policy was that some schools would be specifically short-term institutions, releasing the boys after six months. If their conduct was unsatisfactory then they would be sent to an ordinary school, with the school authorities having the power to decide whether the juvenile should be detained for a further period.

### Borstal Boys:

If reformation was regarded as the guiding principle for children under 16 years old, it was hardly surprising that this sentiment would affect considerations of how those juveniles, over 16, should be treated. These were often sent to prisons on remand, even though many were not sentenced to imprisonment but this sojourn was believed to have lessened the fear of prison. In the search for alternatives, attention was paid to developments in America, where a reformatory home was established for this age group, said to 'combine within itself a prison, a school of letters, a school of technology, a school of physical training, a series of manufacturing departments, and a military camp'.<sup>16</sup> There were great claims made on its behalf, as 80% of its inmates were supposedly reformed upon release. The Americans disseminated information about its nature to their European colleagues, who were wary of adopting it without modifications; one Home Office official castigated it, for its 'avoidance of everything that may hurt a sensitive prisoner's feelings, or remind him that he has done anything to be ashamed of'.<sup>17</sup> Clearly he felt that it had veered too sharply toward reform and had failed to provide sufficiently punitive programs, so that to English

eyes, it was close to ridiculous with its elaborate facilities. It was accepted that some efforts should be made to forestall criminal tendencies that were becoming apparent in juveniles and that they not be 'allowed to drift hopelessly down the current of crime, without a serious attempt at rescue'.<sup>18</sup> Nothing radical was planned, merely a balance between the prison and reformatory, whilst avoiding what was seen as the excessive sentimentality of the American approach so that the new juvenile institutions would not lack 'penal and coercive sides'.

A juvenile adult group was set up at Borstal Convict prison and by 1904 was available to all juvenile adults serving twelve months or over. A program was devised to head off criminal tendencies that were becoming apparent in young adults and the sentence imposed was to be not less than one year and not more than three years. The trainee (as they were known) could be released after six months depending on behaviour, at which time he would be helped by a voluntary organisation, known as the Borstal Association, which attracted broad middle-class support and admiration. Early results concerning the absence of recidivism were encouraging and statutory support was sought to carry out the necessary training, and gained it in the Prevention of Crime Act 1908. The Home Secretary, Gladstone, did not gain the power to extend a Borstal sentence to those summarily convicted or those under the eligible age. All this was evidently inspired by the Gladstone Committee's recommendations to subject different groups in the prison population to different measures, so much so that he admitted that freedom was being given, 'to experiment from time to time in the treatment



of criminals in the light of the most recent theories of criminologists'.<sup>19</sup> The favourable publicity continued so that

the outside world was thus assured that a self-contained, individually oriented and systematic programme of intellectual, physical and moral development was under way in each of the full borstals. Through the annual reports of the Prison Commission and of the Borstal Association the public were told that rigorous gymnastics, sports, class instruction, personal influence and lectures were in operation.<sup>20</sup>

Since the Borstals had been devised with 'hooligan and lounging types' in mind it is no surprise that its regime was somewhat authoritarian so that the inmates would be respectful and deferential to authority, fuelled by the belief that when they left the Borstal they would enter the labouring class. The regime was based on progressive stages, with the boy beginning in the ordinary grade, with the possibility of moving either to the penal grade, for bad behaviour, or to the special grade where he could receive various privileges. Corporal punishment was not available as a sanction, although officials approved of it. Greatest emphasis was put on physical development and though much was made of the juveniles' opportunity of working at a skilled trade, leading many judges to rank Borstal highly, most of it was physical labour. The conceptual basis did not differ substantially from what was available to prisoners during the earlier period of reform and was based on the Benthamite pursuit of pleasure/avoidance of pain schema.



Though the borstal schools were the subject of various panegyrics which lauded the changes wrought upon the trainees the reality was different. Many of the staff were taken from the prisons and were ill-prepared to be able to work to such different specifications and fell back upon their former training. Sympathy for each individual was in short supply. Not all trainees expected such emotional engagement and were resentful of the lengthy period of time which they were expected to serve. Disciplinary measures were provided, with many being sent back to prison from Borstal lest they disrupted the wavering tone of the polices; the Home Office did not wish to publicise this fact, especially to the judges, as they might have taken a more sceptical view of the claims being made on behalf of the Borstals. There were an increasing number of complaints that the juveniles were becoming resistant to any such procedures. The Home Office was not helped by sniping from the Borstal Association that the Borstals should be as far removed from prisons as possible and, more particularly, that more appropriate personnel should be recruited and training, more relevant to employment in the outside world, be provided. The Home Office was perturbed by this attack from what they saw as one of their own, 'a body for whose policy and action I am theoretically responsible'<sup>21</sup>, commented Ruggles-Brise, and firmly stressed that they had not deviated from the original principles of the Borstals. The conflict was fuelled by two different conceptions of the juveniles: one saw them as potential criminals who might well turn out to be recidivists and the other viewed them as children who had the misfortune not to have grown up in the right kind of environment.

Again the dilemma of how exactly to choose between deterrence and reform had not vanished; it reappeared again in the question of how juvenile offenders should be treated. Ruggles-Brise obviously did wish to see a more relaxed regime in place. Borstal was an improvement on the regime which obtained in prisons for juveniles but he was unsure as to how far this should proceed. As stated, it was meant for juveniles who had already tried their hand at criminal offences and looked to be making a good fist of it. On some occasions, the prison commission insisted that 'the Borstal institution should not be regarded and measured as if it were a sentence of imprisonment passed as a punishment and as a warning to evil-doers, having both in its purpose and effect a reformatory rather than a penal object',<sup>22</sup> which is not to say that deterrent policies could not feature somewhere. Unfortunately for the penal authorities, there were a number of bodies who knew in what direction they wished to see the Borstal regime proceed, among them the Howard Association; so that 'by the early 1920s a substantial indictment had been drawn against the Borstal system by a number of unofficial and semi-official hands',<sup>23</sup> all of whom blamed the Borstals for failing to provide the trainees what they needed most, the ability to act independently of any regime.

## 6.5 Prisoners on Probation

Apart from the fervent opponents in the separate versus silent system debate and the pioneering Alexander Maconochie, grave doubts had always existed about the efficacy of what could be achieved inside prisons, and its



ability to manufacture changes that would remain constant, upon exposure to the world outside the prisons. Probation or its nascent form in the 1870s seemed like an answer to these fears for the concept held out the promise of keeping offenders out of gaols but would still subject them to supervision. It was modelled along the lines of a gentle paternalism, not imposing changes upon an individual but looking for the individual to modify his own behaviour, through 'voluntary efficiency'. Superficially, it also seemed to promote savings for the State, substituting a short sentence of supervision for a long period of incarceration.

It was initially suggested that probation be promoted through the provisions of the Prevention of Crime Act of 1871 and 1879, allowing for police supervision. The chief advocate of probation, Howard Vincent, had little time for the device of releasing offenders upon recognisance, an undertaking to reappear before the court and to observe certain conditions laid down by it, since it provided no mechanism of supervision and enforcement. For the reluctant offender, there was no incentive to reform and no way of upbraiding him if his conduct was unsatisfactory. In its place was proposed police supervision for first-time offenders, the supervision not lasting longer than the longest possible term of imprisonment for the offence in question. To many, this seemed like a gross intrusion into the lives of people who were hardly hardened criminals. The police were reluctant to become embroiled in this venture, since they considered unsuitable supervisors for incipient offenders and the judiciary evinced similar attitudes. The Act could only be passed into law if these draconian



provisions were dropped; so the court was to have regard to the background of the offender and extenuating circumstances of the offence and if it saw fit, could release him on recognisance. There was to be no supervision. In this amended form, there was little novel in the Act and many of the judges preferred to use the Summary Jurisdiction Act of 1879 since it did not require them to record a conviction. If the legislation was never quite a dead letter it was certainly moribund for quite a time.

Following the Gladstone committee, probation was examined again. The Howard Association had long campaigned for its introduction as a means of disciplining young offenders without sending them to prison, an option from which many magistrates were abstaining on grounds of unsuitability for ones so young. It would check criminal tendencies better than an admonition but would be more economical than detention. The Home Office also was prodded toward action by the Committee of Wage Earning Children which stressed the need for separate children's courts with probation officers. There were arguments both for and against its introduction in Britain. It would achieve some of the desired individuality in the administration of penal justice, as the judge could delve into the particular circumstances of each case and secondly, 'the tutelage exercised by the officers during probation is salutary and beneficial, and calculated to check at its outset a criminal career'. On the other hand the duties of any probation officer might conflict with the police and the probation appeared to be expensive and might become inquisitorial.<sup>24</sup> There existed already an unofficial form of probation in the form of missionaries of the Church of England Temperance Society

(CETS), who were sanctioned by the courts to make inquiries into cases that were considered as potentially suitable to be placed under recognisance and to keep an informal eye upon them. Based as this was on notions of voluntary participation and consent, it was ineffectual if offenders rejected the advice offered.

The Liberal Government in 1907 attempted to establish probation, by giving both higher and summary courts the power to give offenders a conditional discharge and appoint a probation officer, to watch over those released while recognisance lasted. The most protracted debates were about who were the most suitable people to fill the role of probation officer: some thought the missionaries could develop probation having already had similar experience, others thought that these agents could not produce the intensive supervision necessary and suggested retired police officers instead, and still others believed both of the above groups were improper and thought that educated people with an interest in social work were best suited. Ruggles-Brise's chief responsibility was for the prisons of which children were a diminishing element. He wished to see probation being used for all offenders, not just children, to reduce pressure on the prisons. It would be a 'State Scheme for furnishing an alternative to commitment to prison... of the vast multitude of offenders who commit trivial and unimportant offences'.<sup>25</sup> Depending on whether one thought probation should be dealing mainly with children or adults, then this would affect the selection of personnel. The missionaries represented an entrenched interest whom the Home Office were loath to disturb, for they had gained the sympathy of many magistrates



through various forms of assistance and promised financial and administrative support. Against this, was the argument that the duties of probation officer and missionary might not be compatible, and the view that the 'police court missionary is well intentioned but narrow-minded, zealous but inclined to preach....As agents of a denominational society they are tainted with the sectarian brush'.<sup>26</sup> The position of the missionaries would depend on whether the Home Office could be persuaded to develop probation along professional lines to the detriment of well-meaning amateurs, pointing to ideational elaboration providing the guidance for change. At this moment, the Home Office was unwilling to get involved in such a factious dispute and left it to the relevant magistrate to choose, from a list, the probation officer that he thought best suited to the case in hand.

There was no mention of government finance, as it was assumed that those undertaking the task of supervision could do so on a part-time basis and without any specific training. Probation officers would be paid but the bill was to be picked up by the local authorities, which was resented since it was believed that probation would take some of the strain off the prison service, leading to benefits for central government. There was to be no central body organising the workings of the probation officers; it was believed that probation would be most effective through the inspiration of each individual officer, an effect which might be lessened if he or she had to adhere to a set of uniform rules. The Home Office was evidently unsure how probation would be received, dependent as it was on the willing co-operation of the magistrates, but there were also differences over what its



precise function should be. Nearly all the appointed officers in the probation service in London were members of voluntary societies, with the majority of them working for the CETS. The development of probation was very much at the mercy of the courts since they were given, in effect, a free hand to appoint probation officers or not; three years after the Act, twice as many were released on recognisance as on probation. The various penal reform bodies were dismayed at the apathy of the magistrates, who disdained to take an interest in probation (perhaps because of the financial implications), and the lacklustre interest of those who did. Many of the magistrates appointed the missionaries immediately, prompting fears about reckless volunteers and there were calls for a supervisory grade of officer to quell any organisational chaos. The Penal Reform League (PRL) was the most vocal in calling for suggested some central administration and finance to secure a more co-ordinated system.

In 1912 those involved in probation work met to found the National Association of Probation Officers (NAPO) and aspired to promote the development of probation work and developments within the service and to create a more cohesive body - a bond of union - able to negotiate on behalf of its members. The PRL was continually pressing for greater rates of pay to attract better-qualified men to the probation service. The Home Office wanted to procure the participation of voluntary societies through a subsidy to provide a 'philanthropic network over the whole country'<sup>27</sup> but was turned aside from this concern by fears about the rising rate of juvenile crime which probation had done little to check. There was, thus, mounting criticism

of dual control, voiced among others by NAPO who wished to see their status rise, believing that professionalisation would secure this. In a reaction to these attacks, the CETS tried to introduce a measure of uniformity into their work by setting up a Central Police Court Mission to organise the work in the various regions of the country. It also urged all member, in the event of a probation officer's post falling vacant, 'to use every endeavour to secure the position'.<sup>28</sup> The drive to secure a specialised, professional service was telling against the CETS as many magistrates began to spurn their services. It was acknowledged by the Home Office that if such a professional service was to come about, then the question of pay would have to be addressed. A majority were paid by fees, many on the scale suggested in 1907. The Home Office could only remedy this by offering a grant.

A departmental committee was set up in November 1920 to examine whether the appointment and payment of probation officers should remain with the local justices and whether the courts should continue to combine with the agents of voluntary societies or appoint their officers. The Howard League for Penal Reform (HLPR)<sup>29</sup> were asking for a paid Probation Commission, with national responsibility for the service but this was unacceptable to many, partly because of the cost but also because it might interfere with the liaison between court and probation officer. On the second question, the CETS could still make a large financial contribution, which the Home Office was unwilling to usurp but it could do little to counter allegations of dual allegiance and potential confusion of roles. The CETS received a caution



that considerable changes would have to be made, among them the separation of the Police Court Mission from the rest of the society and the reorganisation along county, rather than diocesan lines. It agreed that the fee system should be discontinued but the committee was unable to set a universal scale, due to the regional differences in payment and it recommended that the Government should pay half the cost of providing probation officers, when it was able.

The Home Office, in lieu of exercising some sort of financial control over the probation service, tried once again to persuade and cajole the courts into a wider use of probation. Circulars were sent out in an attempt to gain the magistrates' attention, suggesting that committees be set up to organise probation work properly. There were many provincial courts which ignored these blandishments, and which failed to possess a probation officer, and among those that did, only a minority were employed full-time. Since the courts would not be persuaded, greater leverage in the form of a grant was sought, to be given only if probation work fulfilled certain conditions.

Probation did not turn out according to anyone's expectations. The Home Office were glad that the police court missionaries were there to shoulder some of the costs but were clearly discomfited and influenced by criticism of them; but the CETS invoked their influence in Parliament to prevent their being totally squeezed out of probation. The Penal Reform bodies and NAPO were dissatisfied with dual control and the slow progress in professionalising the service, which can be partly placed at the magistrates' feet who displayed their customary reluctance to adapt to new arrangements.



## 6.6 The Reform of Aid Societies

One of the most important influences which could shepherd an offender into a life free from crime was the prisoners' aid society. In the Du Cane era, many local justices turned their efforts toward these societies in order to help the prisoner, having lost their influence over what went on inside the prisons. Prisoners upon release would be given a small sum to set them back on their feet and enter into a mode of honest living. The societies received a sum from the Treasury to give to each prisoner though after 1877, the prison commissioners were given the power to disperse it and so maintain some sort of supervision upon their work, since much of the arrangements and financing were voluntary. Convicts could receive succour from the Discharged Prisoners' Aid Society, but had to give over the gratuities gained by him in prison which, upon release, the Society would hand over to him in instalments, with possibly some extra funds from the Society's coffers. The members of the Society were expected to work in tandem with the police (members of the Convict Supervision Office, est. 1879) but many were reluctant to do so, since the involvement of the police was seen as inimical to their work.

There was little co-ordination between the various societies or between them and the prisons, encouraging tales, perhaps apocryphal, of a 'scramble at the prison gate' by members of the various societies, eager to enlist the discharged prisoner into their group. This haphazard state of affairs was commented on by the Gladstone committee and a report was instituted to

examine their organisation. Their procedures differed enormously with some giving money, others clothing, others helping with securing employment and lodging. Many would only concentrate their efforts on certain categories of prisoners. Most of them (42 out of 56) refused to countenance any co-operation on the grounds that local circumstances varied so much it would be impossible to develop any uniformity. Some societies thought their procedures needed little alteration, some believed that they were a worthwhile model for other societies and one described itself as the 'acme of perfection'. It was not surprising that they made inflated claims for their ability to aid prisoners, but only 13% of those released from local prisons sought their aid and under half that from convict prisons; some ex-convicts referred contemptuously to the Society as a 'mere bank' from which they could only withdraw their money in 'dribblets' and then only on proof of good conduct.

Once again it was the perceived phenomenon of recidivism which was the mainspring of innovation. It was claimed that 3 out of 4 convicts released in 1903-5 had been returned to penal servitude so that all existing policies, including aid-on-discharge, designed to guide the released criminal into an honest path in life were seen to have failed. The commissioners decided to establish an aid society under their control, named the Central Association, which was to assist convicts and preventive detainees. It would offer convicts greater grants than could be obtained otherwise in return for assenting to supervision. The Borstal Association had a similar function with respect to released juveniles and the 'public were assured that these special

groups were systematically and purposefully maintained and controlled for lengthy periods after release and that, if they proved recalcitrant, they were returned to institutional control by revocation of license'.<sup>30</sup>

The prison commission had an idea of what a model aid society should be and tried to impress this on all existing aid societies through use of the existing grant and certification. The local societies were peopled by many local justices and some had devoted their efforts in this area because they had been excluded from the prisons themselves by the commission so they were unwilling to accede lightly. Ruggles-Brise proposed to abolish gratuities to local prisons and to use this money as an increased grant aid to the local societies. However, he also proposed that a new 'General Council' be set up, elected by the local societies, to co-ordinate the aid to local prisons and so regulate their operations. If the strategy was divide and rule, it backfired. The smaller societies feared that their opinions would be drowned out by the larger ones and they were anxious that the smaller societies would have a voice equivalent to their own. A number of large societies were attracted to this proposal and approached the commission for advice. It was reluctant to be seen to be fermenting discord in independent organisations and tried hard not to become involved.

In 1918 the larger societies established the Central Discharged Prisoners' Aid Society whose function was to help, advise and encourage local societies. Though Ruggles-Brise became its president after the war, it was not the body he had envisaged since it was little more than a talking shop, without any regulatory power. The functions of the commission and the local



societies were incompatible, for the former body had to oversee penal policy on a national scale but the latter had shown little concern for co-ordination and rationalisation of activities. They wished mainly to preserve their own societies and to continue to aid prisoners as they thought best, regardless of what the prison commission or individual prisoner wanted. Many of their members wished to reprove ex-prisoners while the latter were concerned to wring as much money from the societies as possible.

### **6.7 The Discontent of Prison Officers**

The prison staff did not welcome the changes ushered in by agitation for reformatory programs. They did not view the reconciliation of the incompatible ideas of reform and deterrence as necessarily devolving upon them, but as adding to the complexity and frustration of their jobs. The shift toward a more reformatory regime meant that staff began to believe that their tasks and position were losing status and that 'the bonds between officers and governors were being weakened, because of a strengthening relationship between governor grades and prisoners'.<sup>31</sup> The staff were not automatically predisposed to oppose any sort of reformatory program but very often they were seen as unsuited and hence excluded from the specialisation of the prison service and assigned to the most inglorious tasks, for which they were not very well remunerated. This fostered a feeling of growing isolation and under-appreciation.

One of the most striking and effective features of deterrence within prisons had been the separate system. This was weakened through several

alterations, the earliest being the introduction of associated labour. The commissioners were willing to grant this concession if they were able to employ extra staff to deal with the more complex arrangements. Its introduction could also be utilised as a disciplinary tool since a prisoner had to earn the privilege to work with his fellow inmates. There were calls to allow the prisoners to converse together, but again it could only be gained after some period of time and at the discretion of the governors, many of whom were unwilling to award it, seeing it as 'a fruitful source of mischief'. Separation was shortened from the mandatory 9-month period for all offenders to periods of three, six and nine months respectively for the Star, Intermediate and Recidivist classes in 1905. In 1911 following representations from the writer John Galsworthy to the Home Secretary about the 'prolonged starvation and agony of the mind' brought about by a period of separate confinement, separation was reduced to one month for both Stars and Intermediates and three for Recidivists. Originally there were cries for its complete abolition but the commission was able to stave these off, though the outcome was appreciated by no-one.

The staff were unhappy, although the Home Secretary, in March 1906, disclaimed any knowledge of their grievances but he did permit them to meet and discuss questions relating to their duties and position in the prison service. In 1910 the Prisons Officers union was founded, in part, to give vent to their discontent. Though they could congregate in individual prisons, a general meeting was contrary to standing orders. In 1915, the Home Secretary was asked if this sanction could be lifted but he refused, and in



the same year the unauthorised Prisons Officers Federation was founded. This new organisation did not gain the total support of all prison officers because it was unofficial and not recognised by the prison authorities and there already existed a union, the National Union of Police and Prison Officers (NUPPO). When the Police Act of 1919 was passed, refusing police officers the right to join a union, the police called a strike in which some prison officers took part. All were dismissed with no possibility of reinstatement.

In an attempt to siphon off their frustrations, the Prison Officers Representative Board was set up so that the commission could consult staff but there were not able to withhold their services. The complaints could be classed as two in nature

( i ) complaints about the paucity of pay and pensions

( ii ) fears about the weakening of their status through such events as confidential reporting and slowness of promotion

Complaints of the second kind genuinely irked, since increasingly staff were being confined to the bottom rung. They were being excluded from clerical work since it required a 'higher degree of intelligence and education than can reasonably be expected of an officer drawn from the subordinate discipline staff '<sup>32</sup> and army and navy officers could still directly enter the position of governor without working their way up. This, coupled with the insecurity introduced by confidential reporting, made the Officers feel that they were being increasingly neglected, a neglect which was directly attributed to the reformatory culture.



The prison officers tried to cultivate links with groups which could help them achieve their aims. The Labour Party, having first supported the right of NUPPO to strike, refused to help them when in government and so the relationship between them was negligible. They had joined forces with the Howard League who seemed equally aggrieved at the prison commission but it became apparent their grievances were not identical but were antagonistic, as the League seemed to be continually agitating for better treatment of the prisoner. The officers complained that 'the staff doesn't receive sufficient sympathy. Reform has been too one-sided and while numerous petty concessions have been made to the prisoner, adding to the worry of the officers' life, and 1001 details of his duty, he is still classified with an ordinary asylum attendant or a ticket collector, with a basic rate of pay that is a disgrace to the country' and spoke of movements that were intent on 'liberating the prisoner and chaining up the officer'.<sup>33</sup>

It would be easy to paint the prison officers as reactionaries but this would be a mistake. They had stated their wish to be involved in reformatory work but had been rebuffed on grounds of unsuitability; this rejection, combined with the increasing demands placed upon them by the introduction of reforms into the prison service without any increase in pay, meant that they became militantly opposed to reform being emphasised within the prison service. Though they were denuded of any resources with which to bargain (foremost among them the power to strike), this only strengthened their resentment and made their co-operation ever more unlikely.

## 6.8 The Reaction of Prisoners

The prison officers are one example of a group who trenchantly resisted any attempts at accommodation of the conflicting positions of deterrence and reform. The advocacy of deterrence would place them in a more favourable position than the promotion of the ideas of reform. Hence, we see that it is not binding upon all groups to work for the reconciliation of the opposing ideas of a constraining contradiction but may only be the responsibility of one group among many. When the Gladstone committee said that there was to be a shift in the orientation of the prison service, it signalled that the ideological basis was open to negotiation from interested parties; this interest did not necessarily have to stem from a desire to engineer a settlement between the opposed positions of deterrence and reform.

One of the most interested parties, with perhaps the most at stake from the outcome of the subsequent debate, was the prisoners themselves. Various structural factors (such as transient population, low prestige, lack of access to resources) would obstruct any efforts to outline a constructive position but they could play a purely negative role, refusing to endorse the reforms that had already come their way and demanding reforms that were more acceptable to them. Even if some of them were willing to recognise the legitimacy of the prison service and their punishment, this would not prevent them from requesting a regime which was more to their liking. From 1865-95, their opinions had been discounted since the emphasis had been on deterrence, so rendering their consent immaterial but if reform was



to work, the prisoners' participation had to be gained. We have already seen how prisoners in the preventive detention camps obtained a relaxation of conditions, since they were convinced that they had previously served out a term of deterrence and were entitled to more lax conditions. What of the great bulk of prisoners who were serving sentences in the convict and local prisons? Were they in a position to obtain a less severe regime?

The prison commissioners were constantly casting around for alternatives to short-term imprisonment, which they were convinced was ineffective in preventing crime. Moreover, there were many held in local prisons who should not have been there, such as people who had not paid their fines or were being held on remand. Progress was made in clearing the local prisons of what might be called 'non-essential prisoners', those who did not really deserve to be there. Hard labour, as previously defined, was amended and so the wheels and cranks were discarded, to be replaced by such activities as sack making and stone breaking. After a month, the prisoner could proceed to labour in a workshop, producing items for use by government agencies. The prisoners were mainly divided into two classes, the intention being to keep the proven criminals apart from novices, to keep the latter from corruption.

One of the great problems in estimating the extent of reform was that different groups had varying expectations of what it was that was to be achieved. The prison commissioners were sincere in claiming that great improvements had been made and, in comparison to the previous regime, they were probably correct. Floggings had diminished, the diet had improved



and women could associate whilst labouring from the beginning of their sentences. The entry into the local prisons of both the female suffragettes before the Great War and of conscientious objectors during it, ensured the indictment of the local prisons by the Labour Research Group in their report, both groups having copiously recounted their experiences. Both carried expectations which could never have been satisfied by the conditions of the local prisons, premised as they were on classical notions of deterrence and uniform punishment; the prison, to them, had transformed what should have been 'elementary rights' into rewards. By their own testimonies it is clear that the new ideas of criminology never penetrated the local prisons as they complained of 'the suppression of choice and personality....the absence of individualisation'.<sup>34</sup> As with the Fenians in the previous century, these groups posed a dilemma for the prison service, which could not be answered whilst its present form was retained. This stoked the embers of discontent which would, after a period, threaten to consume the existing penal arrangements in a campaign for change. Though the articulateness of the political offenders proved to be the catalyst for change, they built upon previously existing widespread grievances throughout the penal system, providing the impetus for another period of change.

It is difficult to see how a genuine concern with the individual could ever enter into the local prisons, since the terms of most of the sentences were too short to effect any permanent influence upon the prisoners but the time available was sufficient for programmes of deterrence to work. Due to these obstacles, the prison commissioners had decided to concentrate their

efforts to reform prisoners upon those specially differentiated prisoners for whom there was the time available to operate a worthwhile reformatory program. Though this was the intent of the prison authorities, there was nothing to prevent other groups attempting to seize the initiative and demanding why reform was mainly confined to some groups and not extended to others, to the same degree.

Similarly the prison commission did not wish to advance too quickly in developing reformatory programs for convicts lest sight be lost of the necessity of deterrence. There were various improvements such as the cessation of 'heavy open-air labour' and its replacement by workshop employment. This meant that 'the absence of industrial training is not so marked as in the case of local prisons' though it was claimed that 'little advantage is taken of the opportunity to teach trades'.<sup>35</sup> That the prison commission did not wish to be pushed too far too swiftly down the road of reform, is shown by their reluctance to accept some of the more radical reformatory proposals. Hence it was said that 'it is therefore very difficult to detect any radically different reformatory principle in operation in convict prisons or...any strikingly different mode of managing, categorising or classifying them according to the requirements of eugenic or any other criminological theory'.<sup>36</sup>

## 6.9 Syncretism in the Balance

The position of the penal service, 25 years after the Gladstone Committee was unresolved. No-one was yet sure how the balance between deterrence



and reform should be struck. Even after the prison commission had agreed to separate those for whom a spell in the local or convict prisons had proved ineffectual from the great mass of the prison population, they were still faced with two dilemmas.

1. What kind of regime should be constructed to suit these various categories who had proved unamenable to the treatment provided in the normal prisons?
2. For the bulk of the prison population still remaining in the prisons, would a regime still based primarily upon deterrence be sufficient?

Thus we can see that the proposed answer to the seemingly irresolvable task of reconciling deterrence and reform was to identify groups of prisoners that would be more susceptible to reform and other groups for whom deterrence should remain the mainstay of their treatment. This syncretic formula had failed to satisfy many, for varying reasons.

Magistrates and judges were extremely suspicious of departures from classical justice and so failed to apply punishments which seemed to them disproportionate to the offence, a sanction on which the viability of preventive detention and the schools for children depended. Indifference meant that probation was not greatly used by many magistrates and when it was, probation was carried out by police court missionaries who had were often suspected of working to a different agenda than what the State required. Likewise, after-care was facilitated by the prior existence of many aid societies which hindered state involvement and organisation but



governments were reluctant to displace or displease them for fear of losing the potential savings they brought.

If for some, such as the magistrates and prison ranks, reform was a step too far, for others it was not being pursued fast enough. This was clear in 1922 when a massive 700 page report on the state of the prisons was produced by the Labour Research Group (both of the authors had spent time in prison) and it was couched in damning terms with the conclusion being that the prison authorities had not lived up to their promises of introducing reformatory measures. The prison authorities had tried to hinder its publication by reminding its staff that statutory rules forbade them from communicating with outside groups but some did so regardless. The prison commissioners greeted its publication with a degree of complacency noting that 'genuine public interest in the treatment, education and re-establishment of social failures is still faint'<sup>37</sup> and the respective inquirers (sympathetic to the Labour party) were in opposition, though there was some trepidation as to what would occur if they came to power.

#### **6.10 The Triumph of Reform ?**

I have ended my historical analysis in 1920 because Garland claims that by 1915 reformatory practices, inspired by criminology, had secured a place within penal practice. I have gone slightly beyond this period to show that there are grounds for disputing the revisionist case. Reform did not triumph because it could never shake off the attendance of deterrence; if it were to secure favour, there would either have to have been an exercise in cultural

repression, as from 1865-95, but which was made more difficult by the number of groups involved from 1895 on, or else great endeavour to come up with a formula that would reconcile the two. By 1920 neither of these had been achieved so that reform could not have attained the prominence claimed for it. By ending at this time-frame I hope I have convinced the reader that the problem of reform and deterrence has always been an indissoluble preoccupation.

I have outlined a different history from what has been customarily recounted in the revisionist school of penal history, inspired by Foucault's *Discipline and Punish*. I have shown that the idea of reform did not come to predominate at the expense of the notion of deterrence; it did receive greater prominence but was not unquestioningly accepted. From the characterisation of reform and deterrence as a necessarily incompatible pair, it follows that there could not be a simple installation of policies, inspired by one idea with no reference to the other. Though the revisionist school may accept that these two ideas are incompatible, for them they attain to a similar end. Rather than seeing the continual advancement of reforms within the prison service as purely progressive, it portrays them as a more refined and efficient means of controlling the prisoners. The most fundamental question that can be asked of such an account is also the simplest: why should we assume that the penal authorities have such an overwhelming interest in supervising criminals and subjecting them to expensive reformatory programmes? The answer forthcoming from Foucault is hardly convincing: it profits the authorities to have a supervised criminal class



under their thumb, though typically there is scant empirical evidence brought forward to substantiate this position. Foucault is forced into upholding this position because, having admitted the failure of the prison, he asks what is served by this failure, i.e. there must be some underlying function that is satisfied by the continuing inability of the prison to reduce the level of crime. However, if one takes seriously the incompatible modes of punishment which the prison has to carry out, one will not be surprised by the lack of success of the prison, for it has always been expected to fulfil mutually exclusive orders, so forever leaving itself open to the charge of favouring one at the expense of the other. The failure of the prison is thus explained not by incorporating dubious, vaguely-functionalist assumptions but by its incompatible premises and the dissatisfaction (at the social level) that this failure, to observe both, invokes.

To understand the impact of criminology we must see what kind of situational logic it promoted and how it melded with the prior ideational framework? This means noting the relations between the most basic premises of the criminological framework and establishing how these fitted in with dominant ideas of punishment and justice. In short, how did the development of criminological ideas affect the notions of the necessary incompatibility between reform and deterrence and the necessary complementarity between punishment and justice which entailed, crudely, equal punishment for all offences of a similar nature? Dealing with the latter pairing first, we have seen that people did realise that criminology did threaten the notion of just punishments by advocating what were seen as



disproportionate stays in government detention centres; the judiciary needed no encouragement to shy away from what were seen as abnormal penal practices but warnings were issued nonetheless, of the possibility of sentences being determined according to the findings of lab technicians.<sup>38</sup> The novel ideas of criminology and their implications for sentencing practices were only ever gradually accepted but in the period under investigation they were largely shunned.

#### Reconciling Opposites:

This study has largely focused on the necessary incompatibility between reform and deterrence because it seems the most unlikely pairing of ideas: why would people endorse mutually incompatible ideas? As we have seen, there are a variety of answers to this: people may harbour a vain hope that the two are not really contradictory as the administrators of the first prison at Millbank believed; or they may realise how the two ideas conflict but seek to overcome this, by lending their weight to one and concealing this fact, and so it was with our second period; or else they may seek a compromise solution which tries to efface the most obviously antithetical elements but there is no guarantee that this will satisfy those who are devoted to just one of the ideas exclusively.

Though the aim is accommodation there is no guarantee that this will be achieved because, in contrast to the earlier period, groups will be appealed to, who had previously been denied the opportunity to air their feelings and weigh in with their opinions. The party initiating the search for a compromise solution may come up with their own formula but there is no

guarantee that this will please everyone. Thus though the logic points toward peace the result may be discord.

The prison commissioners wished to strike a balance between deterrence and reform, by selecting various categories who were either unsuitable or unamenable to treatments based around deterrence and subjecting them to reformatory programmes. The residue would be left in the convict and local prisons to serve out their time in a regime that would not change radically. Garland would not dispute this, as he believes that the institutions of penality were placed along a continuum of deterrence and reform with the prisons at one end and probation and after-care at the other. This understates the complexity of the problem as the problem of combining deterrence and reform had to be tackled within each sector of the penal system. Thus the need for the provision in the 1854 Act which sent the child of under 16 yrs. to fourteen days imprisonment, before committing him or her to a reformatory was hotly debated and not abruptly discarded in the early years of the 20th century. There was similar uncertainty about the 'dual-track' scheme for habitual criminals: if they were to receive a disproportionate sentence, then surely they would have to be treated to a more lax regime whilst in prison. So even if no other group had intervened in the debate about the proper balance between deterrence and reform, problems would have arisen. It is a mistake to always view ideas as necessarily connected to the use of power, for difficulties might arise even if no-one disagrees about the necessity for a particular set of ideas. Power, as we said, is the ability to realise one's will despite resistance but what if the source of



resistance is not other people but the ideas themselves which Foucault had claimed always lead to power? Even if the prisoners themselves had accepted en bloc the legitimacy of their prison terms, the penal authorities would still have been faced with the afore-mentioned dilemma. That ideas may become a resource in a power struggle has never been in dispute but the connection is only ever a contingent one (a matter of historical circumstance). We should first attend to the particular situational logic of sets of ideas before investigating how these may be exploited by interested parties.

Where criminology made the most inroads was in the area of contributory environmental factors in the causation of crime; it became to be considered a reasonable reaction on the part of the child to turn to crime, having been brought up in a family environment riven by poverty and unemployment. The solution was to create an environment which would foster the opposite qualities, hence the approach in inebriate reformatories and Borstals to establish an environment conducive to orderly behaviour. Once prisoners were more finely differentiated post-1895, it made the task of reconciling deterrence and reform all the more unlikely, for now the balance had to be struck not only for a single category of individuals (the prisoners) but within each group of newly-differentiated prisoners. The prisons had not reached the stage suggested by one Secretary of State, in 1910, who stated that 'we should not now strive to make more exceptions from a general rule, but to make the whole system increasingly one complex series of specialisations so that the general mixed prison should go with the



general mixed workhouse into extinction'<sup>39</sup>, but specialised treatment had begun to find its way into penal practices. The previously immovable status of equal punishments was rocked and rendered the search for some syncretic formula between deterrence and reform all the more difficult. I am not retracting my criticism of Garland since I do not believe that the evidence warrants the conclusion that criminologically inspired theories of punishment predominated, for the reasons outlined above, in the first two decades of the English prison system in the 20th century. It is an open question how the tussle between uniformity and specialisation turned after this period.

#### Defending Interests:

The search for a more specialised penal system had inevitable consequences for existing structural arrangements: it entailed that various functions had to be fulfilled by bodies beyond the control of the centre, initially at least. Previously the main component of the prison service had been the local and convict prisons over which the government exercised total control. As it introduced various novel institutions to cope with those deemed unsuitable for treatment within the prisons, it had to deal with existing arrangements as it found them. It could not draw its policies on a clean slate but had to take these arrangements into account. This was not necessarily unwelcome, as the prior existence of interested parties meant that reforms could be introduced without having to expend a great deal of money, which was especially the case with probation and less so with the aid societies. That the government compromised with these groups meant that no-one got what they wanted, which encouraged elaboration and

clarification which would provoke the government toward increased intervention or contentment with what they had already achieved.

This transformation would have counted for little if the government proved unable to persuade the judiciary to make use of these novel arrangements when handing down sentences. The Home Office sought more nuanced judgements from the judiciary as it provided more specialised services, in its treatment of those convicted of crimes, but was unable to compel the judiciary to do as they would have wished. The judiciary were protected from overt interference by the virtually unchallenged belief that the executive or legislature could never dictate to the judiciary. This belief has been enunciated thus:

‘there is a principle of judicial independence; attempts by the executive arm of government to influence sentencing policy are unconstitutional; attempts by the legislature to interfere with the sentencing discretion of the courts are, even if not strictly unconstitutional bound to result in both practical confusion and injustice to defendants; the development of sentencing policy should therefore be left to the wisdom of the courts, under the guidance of the Court of Appeal, and intervention by other bodies can only worsen the situation’.<sup>40</sup>

The inviolable nature of this belief not only affected decisions at the operational level but also prior to this, at the stage at which changes were mooted: as an official noted ‘tradition must at least be respected or there will be trouble with the judiciary’.<sup>41</sup> Beyond imploring the judiciary to pay



more attention to incipient reforms in the penal sphere, the only way to influence them was to develop an ideology which would call into question the tardiness of the courts. Obviously this could not be done directly, as it would have been interference but it could be done through the various reform groups and more generally through the device of public opinion which had previously proven successful in generating movement, by the courts, toward greater uniformity in sentencing. As long as there existed a lack of consensus between the prison authorities and the courts, it was unlikely that there would emerge a result that could be attributed to the designs of any one group. If we then include the various other agencies who had a stake in the punishment of offenders, whatever form that might take, this outcome is all the more likely, so that any theory must reflect the consequent complexity and not reduce events to fit one particular pattern. What has been lacking in the revisionist account has been a pluralism of both ideas and groups; I have tried to show in this chapter how important all the afore-mentioned groups were for influencing the direction of change, even if they only played an obstructive role. I have shown how much was at stake for all groups involved, in either promoting or obstructing change, but the power/knowledge approach would leave them all mute except one whose views predominate by virtue of methodological fiat, of always linking knowledge with power.

Very often, previous histories of the prisons have been denigrated as 'idealist'; this usually means that change and elaboration are ascribed to the introduction of novel ideas, very often cast in the role of a *deus ex*



*machina*, with little importance being paid to what might be loosely classed as material factors. I have some sympathy with the so-called idealist approach since I hope I have demonstrated that ideas, beliefs and values are of paramount importance in the investigation of penal practices. But what I also hope to have demonstrated is that the 'why and how' of these ideas being adopted and incorporated is not simply due to passionate benevolence on the part of some altruistically-minded reformers and quiet consent on the part of others. Ideas were very often sought because the mundane features of people's lives (be they prison staff or inmates) were being threatened and these people tried to protect them, in part by developing ideas which would legitimise their concerns and provide a buttress from future assault. Novel ideas were not simply plucked out of the air and installed within social practices, an impression which the Foucauldian has fostered, despite all its talk of power, since it can never make transparent just how ideas are accepted if they carry glaring logical deficiencies notwithstanding talk of effacing them and making them disappear which patently begs the question.

The introduction of these ideas can have repercussions in the structural sphere, the prime example, in this study, being the greater differentiation in parts of the penal structure. This, in turn, introduced new agents into the debate and entailed changes for those already involved in it and meant that there were winners and losers according to the agents' own perceptions. Positions in any social structure carry associated vested interests and if this structure is transformed, then these interests will be affected. It is not stretching credulity to believe that people will take some action to defend

these interests whether they be linked to the new or old order and this action will include articulating their interests in such a form that will (a) grant coherence to a previously unstructured group by outlining their common interests and (b) justify their grievances.

Those unhappy with the direction and/or scope of change, attempted to elaborate their own version of how change should proceed, with increasing success for those wishing to see a professional probation service and not so successfully in the case of prison staff. Since the various reform groups pressed for greater involvement of the government in the probation service, it had to articulate reasons why it wished to proceed at the pace it did and the police court missionaries had to convince the government that it still had a valuable role to play in the probation service. Thus ideas of reform were not inserted into practices without a struggle, nor were they born in a wholesale manner. The foregoing account will, I hope, amend some of the misgivings and misconceptions that have been harboured about accounts dealing with the developments of ideas and their influence upon social life.

In the next section I will give a fuller account of how various ideas relating to punishment and justice were influenced by what are usually termed structural developments; this will correct the lop-sided impression given in the previous chapters that change arose simply because of pressing intellectual troubles. Whilst this is not false, it fails to give the whole story. Any social theory must either include both structural and cultural variables or else explain why one predominated over the other; this is what the next chapter will do. I will contend that the method of analytical dualism can

capture the influence of material forces better than the power/knowledge approach despite its avowed aim of connecting ideas to the machinations and material interests of opposing groups.



## 7. Links between structure and culture

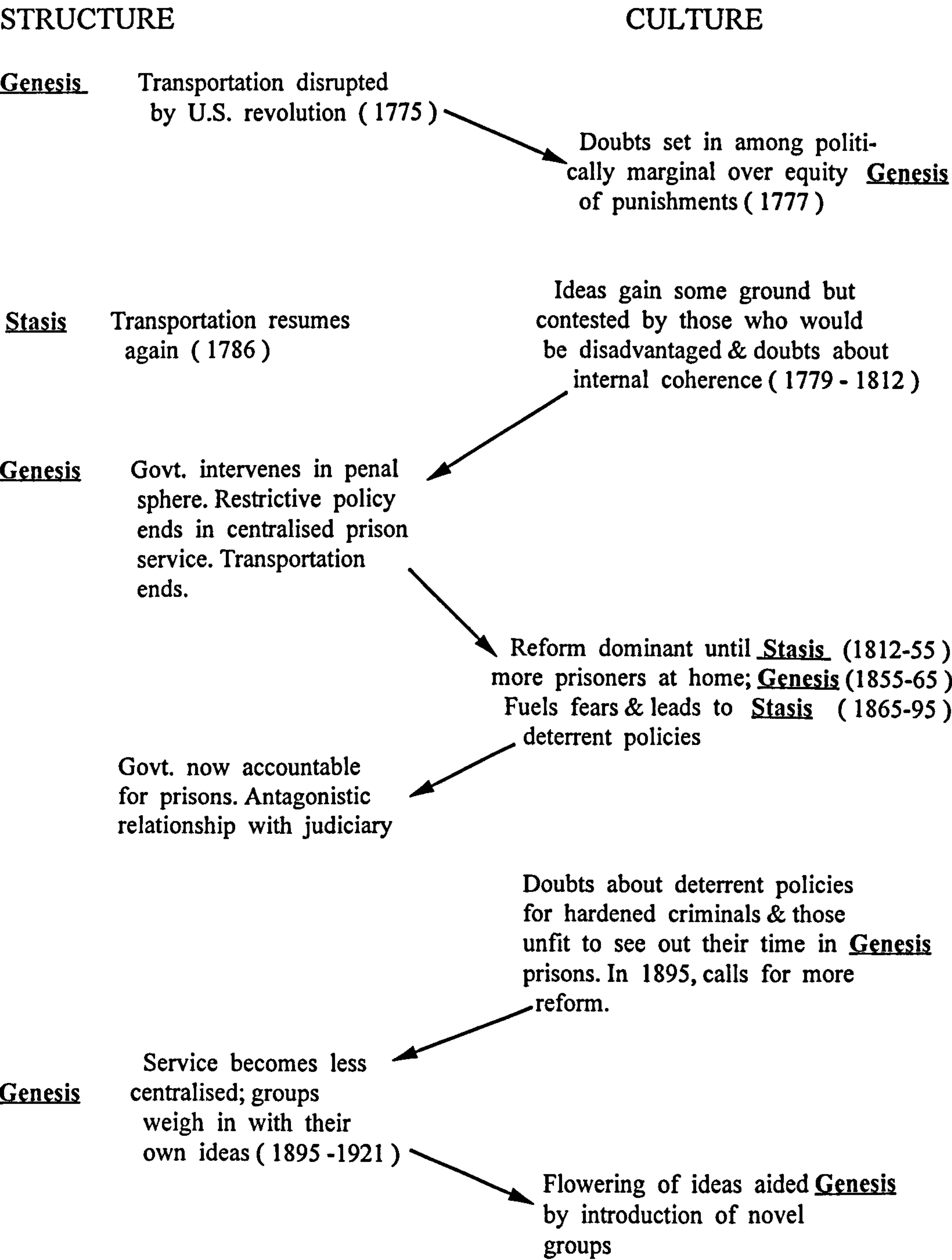
I wish to argue that we must differentiate among the determinants of action, which we will title as structural (those having a material basis) and cultural (those which are rooted in ideas), to examine their interplay. Not only do we wish to examine the influence these determinants have upon agents but also the effect they have upon each other. The power/knowledge approach does not believe in separating out the intellectual determinants from action itself with the unfortunate consequences that we have seen; but what of structural influences? It deals with these in an extremely arbitrary fashion since it is *a priori* wedded to a particular outcome so that any structural influences that threatens to disrupt these assumptions is disregarded since these are often harbingers of pluralism. I noted how the power/knowledge school ignores how various positions in any social structure carry vested interests which induce a defence of them; it also passes over how the relations between various institutions may be of such a particular type that they promote a certain kind of action as the most favourable. This I now wish to demonstrate. The diagram on the next page gives an indication of the mutual influences between structure and culture.

### 7.1 A revolution in punishment

It is evident that punishment depended to a large extent on the existence of the option of transportation, what we can call an instance of structural compatibility. This is to say that punishment was not necessarily linked to

transportation (since it was not exclusively defined in terms of it) but the conjunction of the two was seen as felicitous. Since it was a contingent

Figure 3  
Interaction of structure and culture mediated through agency



relationship between the two, it could be upset and completely disrupted by unpredictable events. Thus the American revolution completely disrupted this mode of punishing, since at the time it was impossible to send criminals to a colony with which the mother-country was at war. This impelled those in authority to find a new means of punishment. In an open system we should not be surprised find that contingent events have the potential to throw existing structural arrangements completely out of kilter and to ask searching questions of people's ingenuity and initiative. The fact that people are able to come up with an intelligible response should cause us to be wary of accounts that rely solely on structural events to provide us with an explanation of change. There is not just one logically possible reply which could have been given as an answer to this crisis, so that we could see the result as some sort of pre-designated response. This is why we have to examine what is generally placed under the rubric of culture, to understand why this particular response and not another was put forward.

As we saw in Chapter 2, the outbreak of the American revolution also saw a questioning of the legitimacy of the then current mode of punishment. Ignatieff shows the two events were not completely unconnected, since it was the Quakers who were at the forefront of this interrogation. They were deeply sympathetic to those who had travelled to America in search of religious freedom and the fact that, in their eyes, England had blundered into the war, strengthened their case for reform of which just punishments and properly run prisons were a part. Prisons were being used, as never before, to cope with the bottleneck of prisoners and this



focused attention on the prisons at a time when Howard had published an exhaustive report on their dilapidated and corrupt state. This concern about the state of the prisons and the lack of any discernible principles that informed practices within, was coupled with an inquiry into many of the mismatches between crime and punishment. The consequent lack of legitimacy of the law seemed to be reflected in official disregard for their opinions about the course of the war. Only an impersonally constructed system of laws, reflecting neither bias nor caprice, could gain legitimacy and so rouse the conscience of the criminal who might fall under its ambit.

An unforeseen event had wrought a great change in the structural arrangements concerning punishment. Those in authority had been caught unawares and, deprived of their customary mode of dealing with criminals, struggled to deal with the criminal body, the problem of order being exacerbated by an economic slump. When the possibility of transportation presented itself again, it may have seemed that the structural status quo could be restored but events had not simmered down so much, that the lid could be placed back on the pot. For what had happened in the midst of the structural turmoil was the introduction of a cultural change, as those belonging to the nonconformist religion of Quakerism drew lessons from the war with America and initiated a critique of the current state of punishment. I am not trying to suggest that this was wholly determined but nor was it completely fortuitous. Certainly an individual like John Howard was unique and cannot be accounted for, in a predictive fashion, by any social theory. But England's war with America did definitely provide an opportunity for specific sections

of English society to question the legitimacy of the regime and its parts. We have to look at cultural values for an explanation as to why national prisons, financially supported by the government, were built at the beginning of the 19th century. The same structural conditions obtained then as they did before the outset of the American revolution yet a different result was in the offing. The structural arrangement of punishment also depended on a cultural consensus that banishing criminals to a far-away place was the best way of dealing with the problem of crime. Once this prop had been pulled away, the structure of punishment began to sway unsteadily but was not to totter immediately.

Although we should accept the validity of culture as a viable element of a causal explanation, this does not mean that we can assume that the beliefs were immediately translated into action. We must examine what aided or obstructed the realisation of these beliefs. The reformers identified themselves with mass of the public, 'they took their own heightened sensitivity to physical cruelty as symptomatic of general social feeling',<sup>1</sup>. They could not fail to feel that they were being discriminated against almost to the point of being subject to tyranny, due to the unjust nature of the law- they had many affinities with Bentham's project to rationalise the criminal law and remove the large elements of arbitrariness from it.

Not everyone shared these sentiments nor the reformers' steadfast beliefs that criminals could be reclaimed and returned safely into the community; many could not see the point of expending the finances necessary to properly assess these ideas. Thus, there was not only the structural influence



of the existing felicitous set of institutional arrangements at work, which militated against the novel idea of prisons, as places of punishment for all criminals, as transportation carried clear benefits; minds also had to be won over in a battle of ideas. Where the structural influence did come in was in showing who takes up the torch to set light to this conflagration of ideas and who tries to douse it, through various counter-measures. It was among the Whig radicals that ideas of reform found their most receptive audience, since it chimed with their general call for administrative reform.

The reforms proceeded slowly, held up by the fact that those most in favour of them were on the margins politically and suffered from a lack of instant influence and control of resources, with which to put their plans into action. Here again, there is a structural imbalance impeding the elaboration of novel ideas, which makes the ideational battle all the more important since it is only through this that the structural imbalance can be rectified. The reformers could not embark on a policy of substitution, since they lacked the capital to finance a project which would never repay their initial investment of building their own prisons. The policy of substitution was also not viable because the judiciary would have to be convinced of the need to actually send the criminals to the prisons but they would only do this if the prisons were run with the consent of the existing political establishment; it was not as if they were supplying a service for which there was an already existing demand which was not being satisfied anywhere else. These conditions pointed toward a policy of restriction, having access to the legislature (whether through direct control or indirect influence), closing



down the prisons deemed inefficient by legislative mandate. They could not instigate such a policy, not until they had made some headway in convincing those in power that theirs was the proper course of action and should be adopted. So there had to be a breakthrough at the cultural level before there could be progress at the structural level (in terms of new organisations).

There were signs that this was being accomplished as even those who supported the resumption of transportation expressed their doubts about its efficacy. One such supporter opined that

Transportation answers very imperfectly the purpose of example...  
tho'a transported convict may suffer under his sentence, his sufferings are unseen...his Chasm is soon filled up with and being as soon forgotten, it strikes no terror into the minds of those for whose correction it was intended to operate.<sup>2</sup>

Even though half of the gaols had been significantly amended by 1812 and some magistrates were coming round to the idea of punishment within prisons (though whether they were filling in the concept of punishment with their own conceptions is unclear), what was equally significant was the number of corrections that were not made. We cannot assume that it was just stubbornness on the part of the elite which prevented these changes but we must also reckon with the indignation of the ratepayer, that he should be expected to pay for these changes. The ratepayers had an obvious material interest in obstructing these changes since they were to be financed out of their pockets and their potentially beneficial effects that the reformers claimed for them were dubious, a theme that would recur again and again.

### Obstacles amidst ideas:

However, it should not be assumed that lack of progress in the elaboration of ideas is entirely attributable to resistance on the part of those who would lose out if these ideas gained ground. There may be a period of consolidation, as those who once ardently supported the novel ideas are given pause for thought, whether through an unforeseen implication or bafflement, when it is unclear how the new ideas should gel with the prevailing consensus. The reformatory ardour and support of the Whigs began to cool as they realised that the prison could be used as an instrument of repression by a reactionary authority and thus represented a double-edged sword: 'it was ironic that the Whigs of the 1790s came to include the penitentiary in their catalogue of ministerial tyranny because...Whigs of the 1780s had championed the institution. Now the protests of the political prisoners were bringing home the darker side of Howard's philanthropy'.<sup>3</sup> This was an ambiguity about the prison that reformers would never be able to resolve- they would never be able to ensure that punishment within prisons would be completely beneficial toward the prisoners. If they had not been fully aware of this, then the suppression of sympathisers with the French revolution emphasised that penal punishments could be inflicted with no thought or concern for the welfare of the prisoner. The conjuring up of the image of an English Bastille did nothing to help the propagation of reformatory policies within prisons.

The potential incoherence of the idea of punishment, that the instruments of reform could be twisted to the ends of deterrence was one stumbling-



block; the doctrine of less-eligibility also represented one of the greatest obstacles to the implementation of penal reform. The belief in less-eligibility was one from which deterrence drew much of its support and none of the reformers denied its importance nor its place within the new methods of punishment. To do otherwise would have meant admitting that prisoners would enjoy better living conditions than many of the law-abiding but impoverished citizens, which would have been repugnant to the idea of punishment. What this affirmation of less-eligibility meant was that the reformers were driven toward reassuring those sceptical sections of the public that deterrence and reform could be reconciled, that the rigours of punishment would not be lessened by the introduction of ideas of reform. This was only a superficial response which was undermined by actual practice. Once the government had taken control of some prisons, the only way it could have maintained the idea of less-eligibility was to abandon internal control of the prisons; only this would have ensured that some of the appalling and poverty-stricken conditions in the wider society were replicated within the prisons. Once the government had insisted on supervising some sort of program of punishment, this meant that conditions would be superior inside than for many outside the prison walls. This either contravened less-eligibility and so meant that reform was accentuated at the expense of deterrence or else that more traumatic psychological punishments were sought to denigrate and lessen the impact of the profusion of relatively luxurious material conditions.



The realisation that penal reforms could never unambiguously be a force for the benefit of prisoners because some measure of deterrence would have to remain, despite being antithetical to the project of reform, meant that the reformatory movement was checked but not completely halted. We can see that these ideas, in spite of the problems associated with them, began to have an increasing influence on the structure of punishment. It is difficult to date this structural elaboration exactly but it could be said to have begun with the first national penitentiary at Millbank for this was an intrusion of central government into the area of penal punishment from which it would never withdraw. After this the government took an increasing interest in prison reform and of the cries about the disparities of punishment within the country. The policy they adopted to rectify this situation was one of restriction, compelling the local prisons to adhere to newly-passed legislation through an inspectorate, a result which was to culminate in all prisons coming under the direct control of the government. This was believed to be the only fail-safe way of ensuring uniformity.

The structural elaboration of penal arrangements cannot be traced entirely to the circulation of new ideas. Notwithstanding the problems in working out a doctrine of reform we may still ask why they were they taken up at this time rather than another. The period between 1805-24 saw almost a threefold increase in the number of people committed for trial at assizes in England and Wales and the causes of this upsurge were manifold.<sup>4</sup> Much of the agricultural work had become seasonal so that many who had worked during the high season drifted with the coming of winter, some turning to

crime; the labour markets of the industrial towns were highly susceptible to the vagaries of international demand and if a downturn came, many were thrown out of work. There were concerns also about overpopulation in the big cities and hence the lack of jobs for the young and the escalation of juvenile crime. As old methods of punishment seemed not be working, the authorities were ready to try novel ways which promised better results which did not necessarily mean that prisons were supported simply for purposes of reform but were also intended to distil a greater measure of deterrence. The existence of these strains in social relations were not a sufficient condition for these ideas to be taken up- this would be to ignore the intense lobbying carried out by reform groups over a number of years, though they may be said to have been a precipitating factor. Still less can the prison reforms be said to have been just an attempt to reassert social control in the face of various crises since 'the fact of crisis itself would not explain why authorities chose the particular remedies they did, why they put such faith in institutional confinement when greater resort to hanging or to convict gang labour in public might have been equally eligible responses to the perceived breakdown of social controls'.<sup>5</sup>

Is my position not perilously close to Foucault's since I admit the influence of ideas upon social structures even though it is a position which I have hitherto disavowed? My position is not in complete agreement, for the influence brought about by these new ideas are neither immediate nor complete. They are not immediate for these ideas had been circulating for a long period before they were adopted, indicating the necessity of taking



pluralism at the ideational level seriously; we must also accept that the ambiguities and incoherence at this level may have played a part in delaying the introduction of novel ideas. This leads onto my second point that the influence was not complete: the reformers were disappointed that the government, even when they had indicated a degree of support for their ideas, did not proceed at the pace they would have liked. There were powerful arguments and interest groups against so doing, so the reformers did not have a clear field on which to play. There were powerful groups lined up against them, a point which Foucault seldom heeds. The second way in which the influence was not complete, was that we cannot see the realisation of these ideas as a purely cultural event, a disconnected battle of ideas but rather we must see their introduction as attached to very definite structural conditions. Foucault in his narrative does try to connect up the changes in the penal sphere with the fear of the propertied classes over the increasing restlessness of the masses following the French revolution but with his methodology, it is difficult to see how this sort of occurrence could be included. This is because he sees power as intrinsically connected to the development of knowledge but as we have seen, ideas may be circulating for a long time before they are granted recognition and a place within the relevant policies.

## **7.2 Governmental interventions**

Following the building of Millbank prison the direction of governmental intervention was as fixed as the remorseless logic which directed it; this is



not to say that all sections of Tories and Whigs were enthusiastic about it, rather they could not devise a convincing argument against reform and the eradication of regional variations in punishment. Only when reform seemed to be contributing to the crime-rate were they given a sturdy enough stick with which to beat the proponents of reform.

The only way to reduce variations in punishment was to become more interventionist, whether this meant passing more restrictive legislation that would set ever stricter criteria for the upkeep of prisons or building new prisons, which would prove to be a substitute for those with which dissatisfaction was mounting. So increasing centralisation, whereby government officials connected to the government accumulated more influence and power and the extinction of alternatives to prison, chiefly the hulks and transportation, were the main features of the structural changes in the penal sphere.

#### Unintended effects:

These changes were the result of the ever-more effective influence of the reformatory ideas which were to manifest themselves in the decision to discontinue the use of transportation. There were two principal objections to it: the first was that it failed to provide a certain punishment since what would befall any offender was unknown. Thus a once-off criminal might be visited with a disproportionate punishment and the hardened criminal the reverse, thus punishment had descended into a 'mere lottery'. The lack of certainty concerning the severity of sentences was said to be undermining

its effectiveness as a deterrent since many offenders believed they could gain a better life in Australia. The second objection to it was that it made no attempt at reforming the offender but relied on the method of inflicting pain which did nothing to teach the offender to abstain from immediate gratification. Thus the criticisms were based on the long-standing beliefs of the reformers: there must be equity of punishments and consequently there would be certainty about their effects insofar as similar offences received roughly the same punishment; so attempts at reform would have to be admitted into practices of punishment. These objections surfaced at the Molesworth Committee on Transportation in 1838 and, having decided that building prisons would be more expensive in Australia than in Britain, the members said it should be gradually run down, a result which was to be achieved in the 1850's.

It is ironic that as a result of the tailing off of transportation, achieved largely through the deployment of arguments favoured by the reformers, this (structural) change should rebound back upon the policies in operation inside the prison. For in Chapter 3, I gave an account of the fears that were raised by the early release of convicts in England, fears which were to be the catalyst for the ever-present calls, for more deterrence within the prisons, to become more vociferous. This was to culminate in more severe programs of punishment as it was believed that reformatory policies were ineffectual in persuading criminals to desist from crime.

The other unintended effect of the prominence of reformatory ideas was the proliferation of different types of penal practices, the elimination of



which was the chief reason why prison reform had gained such support. This result was the effect of internecine disputes among penal administrators as they could not agree on the best method of punishment and devised ever more elaborate models to withstand the criticisms of their rivals. Not all prisons partook in this ideational battle but dragged their feet for as long as possible since they had still to be convinced that all the amendments were actually worth the money required to implement them. The introduction of novel ideas had exacerbated the situation which they had been designed to resolve, the disparate state of punishments throughout the country, so much so that Dixon detailed five different models of punishment by 1850; but this worsening of the situation eventually worked in the favour of those who favoured centralisation since further governmental intervention seemed to be the only possible solution towards reducing the stubborn state of diversity amidst the prisons.

Government control was all the more imperative following the decision to buck the situational logic of the necessary incompatibility: it was the only way to ensure that deterrent policies would be pursued, since not all personnel in the local prisons could be entrusted to do likewise. Centralising the prisons was a result of the need to stifle debate about the place of reform through the simplest possible way: by denying access to those who might be interested in reform, be they prison personnel or members of the public. I then tried to show how problems were internally derived from the nature of the scenario itself and we did not need to postulate that the prisons infringed on and interfered with independent groups' interests. The



fact that this can be demonstrated is yet another reason for disregarding a theory which proposes an intrinsic link between power and knowledge, since the possibility of deriving change from lacunae within the most consistent ideational configuration is automatically ruled out (for further discussion, see below).

From the above outline we can rule out several simple scenarios which might be thought useful in social theory. Any one-way determinism whether it be structure upon culture or vice-versa is irrelevant as it fails to capture the complexity of the events. Despite structural elaboration proceeding in one direction there was not a corresponding uniformity among ideas; if anything the increasing prominence of reform only served to multiply the various conceptions of this very concept as people disagreed about the implications of what they observed in the prisons and devised their own models which they thought would better encapsulate the essential elements of reform. Neither can we assume some kind of cultural determinism (which almost always incorporates ideational monism) since then we would have to say that everything should go according to plan. There would be no room for the kind of unintended result that followed from the termination of transportation and which proved to be the undoing of reformatory policies for quite a while.

#### Structure derails the direction of culture:

Following the adoption of a more hard-line policy within the prisons which excluded notions of reform, the government assumed more and more

control of the prisons, resulting in the complete centralisation of the prison service on the back of promises of subsequent equity, uniformity and efficiency. I have tried to show why the continuing diversity of ideas was not reflected in actual social practices and, in so doing, to disarm commentators of the belief that deterrence continued because people had wanted it in 1865 (those that counted anyway) and it would be thus until people wished otherwise. I hoped to avoid notions of cultural systems 'just happening' or through the equally dubious notions of cultural inertia, by pointing out that the tactics adopted were conceived with the express intention of concealing what was truly happening within the prisons, so stifling calls for a return to a more reformatory inclined program. The problem with characterising a period as exemplifying one idea or another is that this may mislead readers into thinking that this was the wishes of those concerned and so ignoring how some people may be manipulated into thinking so. It also faces the problem of explaining any major shift in the values or ideas that people endorse. If it was assumed that most people support the policies in place, whence did these alternative ideas arise? Yet if we see the maintenance of any system of ideas as a dynamic affair we will be able to detail how and why the tactics that supported this system of ideas broke down and lost support.

I have stressed that one of the original inspirations behind penal reform was a desire to remedy the perceived inequities in the criminal law. As I outlined in Chapter 3, this preoccupied many in the 1840s & 50s and much work was done to rectify deficiencies relating to disparities in sentencing



through proposed codification of the law. All these efforts were to come to nought due to the powerful interest group of lawyers and judges, which possessed extensive influence throughout the Parliament. This is a good example of how intellectual turmoil may not be reflected in structural changes since any such change has to pass through the medium of agency; here it was prevented from being transposed into the structural sphere. Nothing more was done by the prison directors because there was little point in taking on the judiciary until they were in a position to implement any concessions they might gain from them; they were already having problems encouraging local prisons to adopt the measures they recommended. It was not surprising that they refused to tackle this problem until conditions made it worthwhile for them to do so. It is only until structural conditions made it favourable for certain interests that ideas were taken up, so showing the relative influence of structure upon culture.

The connection between the ideas of punishment and justice was advantageous, since they seemed to fit together so naturally that no-one could deny the link between them. This logical connection was the most obvious candidate for Foucault's power/knowledge formula since it, of all the logically possible connections between ideas, approximated most closely to his idea of ideas bestowing benefits upon those who hold them. I say approximate, because although this is a likely scenario it does not always hold true; occasionally there may be factors preventing the usual pay-off. Since the ideas relating to reform of sentencing had been in public circulation since the late 1830s, why was it not until the 1880s that the



issue was raised afresh since it had been repressed in the 1850s? The potential benefits accruing from the elaboration had not altered but the structural relations which had pertained before had. By 1883 the government had moved from playing a leading to a dominant part in prison affairs, so that it could now pursue the linkages confident in the knowledge that any benefits it could secure, in the face of judicial resistance, it could put in action. The judiciary were placed on the defensive as they did not question the manifest connection between punishment and justice but simply disagreed on the best means of obtaining it. What they could not deny was the lack of any obvious principle behind sentencing practices and so they were forced to work toward a more rational sentencing policy. No-one disputed the obvious togetherness of the ideas of punishment and justice so it does seem to fit under Foucault's formula. I would repeat what I said in Chapter 1 that Foucault ignores the temporal element in the exploration of the link in a necessary complementary but also fails to show how structural conditions may help or hinder such an exploration. If structure can influence the most favourable cultural logic then we should attend to the possibility that a structural influence may pertain when the benefits of pursuing the logic of ideas are less evident.

I am trying to draw out the continual causal connections that must be made between both structure and culture to establish a viable social theory. There is a constant interplay between them which alone provides the motor for social change. The power/knowledge formula fails this test as it puts forward one possible scenario as definitive of all ideational development

which in itself is untenable and fails to attend to the structural conditions which may make the elaboration of this knowledge feasible or not. When we examine the direction of both structure and culture, we see that structural developments were converging toward a uniform and centralised prison service but cultural developments threatened an upset this because only deterrence was being acknowledged in penal policies. As historians have recognised since, it was partly due to the usage of cultural power by the prison commissioners that this structural development was able to proceed smoothly, since dissenting voices were cut off from the means of making a protest or criticism. These strategies would eventually prove ineffectual against the problems harboured within the very idea of promoting a uniform prison, primarily geared toward deterrence.

Not only is it difficult to envisage how the power/knowledge formula could accommodate structural influence but the account given in Chapter 4 should make us more wary of even accepting that the scenario of a necessary complementarity presents an impenetrable barrier which can deflect any criticism. The gradual acceptance of the validity of the connection between punishment and justice led to the government assuming control of all prisons and the years following centralisation in 1877 seemed only to demonstrate the incontrovertible benefits that would follow, if two such connected ideas were adopted; the alleged savings and increase in efficiency seemed to bear this out. The prison service basked in the reflected glory of a falling crime rate though it did not claim exclusive credit for such a reduction. There was little innovation as prison administrators deliberately



shied away from the conferences that were discussing the conclusions drawn from the new science of criminology; why should they have innovated as there was little incentive to change the policies which seemed so successful? The cries that had been raised a century before for a closer link between punishment and justice were at last bearing fruit and the prison leadership were not about to turn their back on this harvest even if some of the fruit was spoiled.

If the leadership was happy with the prevailing state of affairs, there were others in the prison service who were not but these occupied more menial positions. These saw the need for a more diverse set of punishments to deal with those cases who were not being adequately served by the existing rationale of punishments but since this represented a small minority, their apprehensiveness was overlooked. Thus the logic of the necessary complementarity could not cope with a number of cases: to have done so would have subverted the rationale underlying the treatment of the greater number of criminals. So even the most adventitious of ideational scenarios is not all-encompassing as Foucault's formula would have us believe; it may carry within itself blind-spots, problems which are resistant to solutions according to the prevailing logic and which may be a source of discontent. The obvious socio-cultural reaction to such problem-areas is to pretend they do not exist and that nothing needs changing but there may be more active policies pursued to ensure that dissent is muffled. If people cannot be coerced into keeping their criticism silent, whether through resistance or the impossibility of applying enough pressure- since to do so would have



brought attention to the very issue that was being concealed as in the case of the prison clergy- the next reaction will be to cut off any possible source that would suggest how change could be sought. Hence the penal administrators' studied disdain of criminological investigations and innovations: 'what need did they have of these' was their public attitude but it was clear that they represented a potential threat to how the prison service was run. The influence of the necessary complementarity meant that the administrators drew a protective ring, to ward off any questions or developments that would imperil the standard manner of punishing.

So even the most favourable scenario produced some malcontents but we must not forget that this was not the only ideational relationship relevant here. The other was that arising from the necessary incompatibility between reform and deterrence which produces a situational logic of syncretism, of finding some common denominator between the two incompatible ideas. I have already explained the reasons why this conditional influence was disregarded and the various tactics adopted to ensure that undue emphasis could be concentrated on just one of the two components of the necessary incompatibility. These tactics had worked for as long as the prison directors enjoyed unquestioned control over the prisons; this situation altered after the centralisation of all local prisons and control was transferred to the officials of the Home Office who thought the administration of prisons exceedingly anomalous. It had to be, since it could never be admitted openly that reform had been disregarded as completely as it had been. The civil servants were able to pry into areas which had been closed to others and questioned this

state of affairs which seemed to them unduly harsh and reliant on the prejudices of a few men. Although the structural rearrangement of the prisons seemed to usher in a victory that would ensure that all prisons could be operated without accountability, the very complexity of the task meant that Home Office officials had to be drafted in to aid in the administration of these prisons. There was no guarantee that they would follow the party-line of the commissioners; they opened up again the vexed question of how reform might be introduced yet again into the prison service.

Through the deployment of cultural power, the prison directors had been successful in preventing an outbreak of hostilities at the socio-cultural level despite the existence of divisiveness at the ideational level. The confluence of those who were marginalised and frustrated by the existing methods of punishment and who tried to vent their frustration, coupled with the disenchantment of the civil servants who became appalled at how the prison service had been run as a personal fiefdom through arbitrary diktat, meant that the whole basis of punishment was reassessed. Thus structural change brought in a new body which upset the cultural status quo and eventually led to proposals for further rearrangement of the prison service which were to have further repercussions in both the structural and cultural spheres. Cultural power had done its job but was unable to deal with a influx of people who shared neither the interests or outlook of the prison directors and who were not directly answerable to the prison directors but to the Secretary of State: 'the incursion of the outside world, in the form of



other interest groups, vaunting precisely that which should remain concealed but cannot be hermetically sealed...shows the impotence of these S-C [socio-cultural] strategies when changes in the social structure remove dependence in social relations'.<sup>6</sup> It should be remembered that this external interest group was brought in as a direct result of the government centralising the prisons. That was intended to ensure the continuance of deterrence so that the change which resulted can be seen as deriving from within the dynamic of structural and cultural relationships. Hence we can presume that potential for change can reside even in the most favourable situation.

Unlike Foucault, I have been trying to stress how even the most advantageous coupling of ideas may carry the potential for its own downfall and together with structural developments, this proved to be the case. The power/knowledge formula bids us only to look at the ideational scenario and if this is favourable, to assume that any dominance can be attributed to the power of ideas even if they are reinforced by various socio-cultural strategies; it remains dead to the possibility that a particular structural scenario may be influential in maintaining the flow of benefits or that its influence may mean that the implications of some ideas are not chased up since the prevailing structural context make it unprofitable to do so.

### **7.3 A period of transition**

The analysis of the last period that I have studied is more complicated than either of the two preceding periods and consequently the role played by ideas is more difficult to assess. The problem can be briefly summarised



as one of providing for a plurality of demands through semi-autonomous units whilst attempting to retain overall control and dictate policy. Thus there was not only the ideational conflict continually alluded to before but also the structural problem of attempting to reconcile the need for centralised control while allowing specialised units to work; the two, centralisation and specialisation pulled in opposite directions. Moreover this is the scenario at the outset of the problem and there is no guarantee that there will not be further change which adds to the complexity, through additional interest groups and more alternative ideas, which further diminishes the commissioners' prospects of regaining complete control.

I outlined in Chapter 4 that there was no pressing need to alter the structure of the prison service, at least not until the government had become convinced from various sources that it was necessary to restructure the prison service. Here we witness the power of ideas for, unlike the birth of the prison service which was a response to several crises, the crime rate was falling in 1895 but still a fundamental restructuring of the prison was called for. The prison service had been a victim of its own success as attention was turned to how it treated its prisoners and some prisoners were unamenable to even this treatment.

#### Results of recognising reform:

Though it may have seemed that by giving into the situational logic of the necessary incompatibility and seeking a syncretic balance between the conflicting ideas, despite having held out against it for some time, that the

most unproblematic route had been chosen. Would not the various pressures that had afflicted the prison commission, when it had opted almost exclusively for deterrence, have ceased. This is to ignore the complex interplay that arose between the realigned structural and cultural variables and the subsequent change in different groups' reactions, as a result of a reassessment of the changed situation; this, in turn, formed a feedback link to effect further structural and cultural change. Acceding to demands is one thing, fulfilling them is another.

After 1877, the prison commission had been able to achieve its objective of being able to define the content of punishment; since the definition was spelt out in deterrent terms, the commissioners dealt mainly with the local and convict prisons and largely ignored the other existing organisations. These either supplied methods of punishments unsuited to the inmates of the gaols, such as the reformatory schools, or were agencies intended to lend succour to the prisoner, such as the aid societies. After 1895, the onus was on the leading part of the prison administration (the commissioners) to include explicitly the idea of reform within the content of punishment but also not to lose sight of necessity of deterrence. The government lacked the resources to instigate such changes themselves; this entailed that the institutions that had previously been beyond the remit of prison commission would have to be brought into the fold. As they had been quite autonomous of the government before and as they were not being offered any great inducements beyond recognition, it is not surprising that these institutions would struggle against any attempt at governmental interference.



They would try to make their voices heard in the composition of penal punishment. This was the price that the commissioners would have to pay if they were to get a more diversified prison system. This inevitably meant some decentralisation, as the political centre would play a less dominant part than before. The problem was that a centralised prison system would have to incorporate diverse bodies into the prison service, since it did not have the resources to replace them, and would expect them to carry out specialised operations, i.e. distinguishing between children and adolescents and administering treatment according to their background and problems, within the context of satisfying an overall strategy, of which the diverse institutions may not even have been aware or cared.

The prison commission was faced not only with imposing its will amid the increasing cacophony of voices demanding their say but of instilling some kind of order within a prison system that was growing more complex. This was difficult because the novel parts were still quite autonomous, i.e. those which could order their own operations without help or interference of another group (whether this was done efficiently or not is not an issue here). The prison commission was clear that it saw many of the new adjuncts to the prison service as a way of regulating the overall prison population, of diverting prisoners away from overcrowded gaols to establishments better suited to reformatory endeavours. Systematisation was an intrinsic part of gaining some kind of balance between reform and deterrence, because only if connections were drawn between the various parts of the prison service could, for example, children and inebriates be kept out



of gaol. Obviously the connection here is negative but it could also be positive as in the case of recidivists who were to serve a certain period of time in penal servitude then another period in preventive detention camps. The reasons behind this systematisation of the prison system were not as Foucault might have put it, to punish more efficiently, with less effort and more effect but to ensure that the plural demands of punishment were being met. Again monism is disavowed since it offers us little explanatory leverage upon the complexity of social life.

Even if the prison commission had been able to resolve the tension between a maintaining a centralised service and allowing specialisation, there were still other hurdles to vault. To ensure an adequate state of systematisation throughout the prison service, the prison commission would have had to control the most important influence on what would happen to a convicted offender, namely the courts. There could be no negotiating with the courts because neither the prison commissioners nor the government itself could offer the courts anything, yet the syncretic enterprise depended on the judiciary taking note of the developments and innovations within the prison service and acting accordingly: sending those prisoners for whom these innovations had been devised to their designated sites. This independence of the judiciary or dependence of the commissioners upon them is what makes the social control scenario so unlikely; for reform to have gained such a dominant position it would have entailed that (a) the prison service was systematised so that those deemed suitable for reformation were sent to the necessary places, but as we read in Chapter 6,

the judiciary remained highly sceptical of the reasons advanced for admitting such changes even in the cases of children; and (b) that even if the former condition were fulfilled, those who were running these reformatory establishments would have to concur with the government as to how each category of prisoner should be treated. This was not unproblematic, since the government found that it had to devise a balanced punishment for each category of prisoner, a prognosis with which not all the other groups involved in the reformatory endeavour necessarily agreed or followed.

#### Compromises of bargaining:

The prison commissioners clearly signalled that they wished to set the pace and establish the extent of the changes but they did not reckon on how vulnerable they were in such a situation. Not only were they tentatively trying to introduce more reformatory policies to undo the undue emphasis that had previously been given to deterrence but they were also attempting to repel the danger to the classical justice model, that was built upon proportionality and equality of sentencing. Part of the problem resided in the fact that the admission of reform into penal practices would be obnoxious to the classical justice model and be seized upon by those who wished to see more radical change forced through; nevertheless some measure of reform had to be carried through. They were not quite in the situation of fighting with one hand behind their back, because one hand was beckoning the ideas of reform closer while the other was fighting them off.



This was the paradoxical situation they found themselves in: simultaneously embracing the logic of a necessary incompatibility, and attempting to defend the principles of classical justice against the encroachment of punishments influenced by criminological developments. So not only was there the structural incompatibility between centralisation and specialisation but also the ideational dilemma of trying to instil some measure of reform into the prisons. And this was so whilst trying to maintain the standards of classical justice and ensuring that they would not be sullied by the advance of criminology.

The commissioners were hamstrung by two factors: the first was that did not have the finances to facilitate all the initiatives they wished to see established, so they were dependent on resources being provided from elsewhere. The government were driven by their relative paucity of resources to bargain with groups which had the relevant expertise, resources or both at hand. If the government did not have finances, what could it offer in return? Approval, formal recognition and an imprimatur for various interested parties to pursue their (mainly ideal) interests. The converse of this was that groups, who already possessed their own establishments, could escape complete domination by the government. The government lacked the resources to replace them and since their co-operation was needed, could not simply outlaw and close them down, as was done with many of the local prisons.

Although I have characterised the relations between the political centre and the semi-autonomous groups as one of bargaining, this should not be taken to mean that things were done in a spirit of amiable co-operation, as



it was more often a grudging trade-off. Thus in the case of the inebriate reformatories, the commissioners wished to use them to off-load those categories of prisoners thought to be unsuitable for ordinary prison-conditions. The local authorities were being asked to take on an overflow and bear the cost themselves, an operation which was clearly to the benefit of central government. The government was unwilling to offer anything in return. When the local authorities proved reluctant to take up the slack, central government was unable to coerce them through legislative action; nor was there any other body to which it could turn and which would provide the reformatories. In the absence (or presence) of such structural conditions, the role of ideas and values will prove vital in determining whether they persevere with the project or it is quietly shelved which was the choice in this case.

The probation service represented another opportunity to take the strain off the prison by diverting those convicted for relatively minor crimes into probation as a punishment rather than sending them to prison. Again the prison commissioners hoped to reap the benefits of this service without having to put up the finances for it. They were aided in this by the existence of the C.E.T.S, but in gaining financially they were passing up the opportunity to dictate the guiding principles of the service. What they did not reckon on was the probation officers who were not employed under the auspices of the C.E.T.S coming together to form a pressure group (a union), which would bargain for enhanced status. Their protracted tussle with the C.E.T.S is instructive for while it was clear that through a counter-

ideology, backed up by the Howard League, they had devalued the service the church missionaries were providing, by claiming that the missionaries were unable to disassociate themselves from temperance propaganda, their victory was incomplete. They had not been able to convince the government that their plight was so urgent that it demanded financial intervention. We have an example of a group which won the battle of ideas but thanks to their opponents' superior resources were unable to dislodge them completely. The government turned to groups such as the C.E.T.S because they represented a form of probation that was already underway and so their incorporation into the penal network promised major savings. The important term is 'represented', because the prestige that was originally attributed to the missionaries could be stripped away if portrayed as being harmful to the very ideas it purports to be promoting; prestige is like any other resource in that it can be diminished or accumulated through the course of social interaction.

Again we have an example which diminishes any prospect of an easy equation of power and knowledge: the probation officers had the better case, as was demonstrated by the government asking the missionary society to reorganise themselves but this was not enough to induce the government to turn its back on the finances provided by the voluntary societies. This was not the end of the story, as this outcome left both groups feeling that they had been badly treated with the probation officers redoubling their efforts to secure status. Power is neither a matter of being able to dispose of greater resources in any one encounter than one's opponent nor is it solely a



matter of being able to summon the superior arguments which successfully challenge the validity of the opponent's activities but must encompass both. We can only estimate how powerful one or another group is not by looking how many resources are at their command unilaterally but by examining the imbalance between the sets of resources that both parties bring to the negotiating position. This is not to deny that groups can be encumbered in the quantity of resources that they can command because of the previous effects of power nor that only the original set of resources is with what each group continually bargains. Resources can increase or diminish as a result of social interaction or a group may be persuaded to devote a greater share of its total resources to gain its way. We should not picture the government as coming to the table with a fixed number of bargaining-chips; if necessary, that is, after having been convinced that such-and-such a course of action was essential, the government could call up extra revenue with which it could finance a venture.

The price paid by the government for gaining voluntary input and funding was a diluted say in how operations should proceed; this did not matter as long as affairs went according to the government's wishes but even if this is so at the outset of operations it is no guarantee that things will remain this way. As groups become more involved in the running of day-to-day affairs, they may begin to develop their own ideas as to how operations should be run: this was so in the case of the probation officers and the members of the Borstal Association. Both groups underwent a conversion from being relatively passive groups which were to do the



bidding of the commissioners, to ones which had realised that they had a different outlook on their area of interest and organised themselves in a more structured fashion to press their demands. Thus we should be alert to how groups can alter the very nature of their composition (from being an unstructured collection to a group aware of its ideals and where its interests lay).

Docile groups aroused:

This may happen to a group that was not even involved in any original negotiations but was affected as a result of the changes wrought. Since all people are agents capable of reflective action there is no guarantee that previously dormant bodies, with the potential of becoming an organised group, will slumber on while around it there is turmoil which could affect its interests. So it was with the prison officers who were considered by the commissioners simply as part of the environment in which the proposed changes would take effect and were not considered as an active group, capable of sustaining protest. They could only see the introduction of reformatory bodies in negative terms, since the running-down of the separate system and the changes in the silent rule made their task, which was primarily one of control, all the harder. There was, then, a greater emphasis upon rewards to guarantee good conduct of prisoners and they were also able to complain about staff misconduct which could entail that the prison officer 'would presently be watched without his knowledge and quietly tested, and dealt with accordingly'.<sup>7</sup> Coupled with the prisoner officers'

exclusion from the more prestigious posts that were being introduced as a result of the changing definition of punishment and the government's disregard of their complaints, some felt driven to organise themselves to protect their interests. However governmental sanctions, especially the sacking of those who went on strike, ensured that this group would never regain their former status but their failure only added to their bitterness. Just because a group is unable to make its voice heard or translate its grievances into action, should not lead us to pass over this discontent, for two reasons: though the group may be unable at the present time to secure change at the institutional level (the macro) they may prove to be an obstacle to change at a micro level simply through the aggregate effect of individual officer's frustration; hence the failure, cited by the Labour Research Group, to introduce an attentiveness to the individual prisoner's circumstances. Secondly we should not assume that the their frustration is permanently dispelled but rather that it may be stirred up again, creating problems in the future (as in fact occurred through the rising incidence of industrial action, incidents which had their roots in the reforms initiated by the Gladstone commission).<sup>8</sup>

The changing nature of these groups, such as the prison officers, could then act back on the group which brought them into the area of social action in the first place, bringing the possibility of contention. It also introduces the second problem which handicapped the commissioners' efforts to get their own way. As many of these groups became more organised they developed ideas to promote what they saw as their interests. This made



it more difficult for the prison commissioners to dictate the pace of change, since alternative ideas had developed as to how reform should progress. These groups may not have to look far for such ideas; it may be as simple as the Borstal Association returning to 'the principles laid down for those institutions' and asking for a more consistent application of them, much to the commissioners' discomfort. None of the groups that issued such calls carried the commissioners' overall responsibility so that they did not have to worry about balancing deterrence and reform. Maintaining their preferred course of action would have been hard enough, given the burgeoning number of groups each with their own demands, but it was all the more fraught, given that the commissioners had to consider the total balance between the two opposing ideas that comprised the notion of punishment.

#### Manning the barricades:

This is not to imply that the principles which previously animated the prison service were totally discarded. This is a premature step for two reasons: the first is that just because some people are dissatisfied with how the prisons had been run, does not mean that everyone was unanimous about how they should be run (pluralism again). This would be to assume that all grievances could be superimposed on top of each other but it is clear that many of the demands were incompatible with each other. Dissatisfaction was evident but agreement about how to end it did not appear so quickly, yet while the different grievances were a matter of contention, the prison service still had to continue according to some format (the classical justice



model). Secondly we cannot assume that those prison elites would not mount some kind of defence in the face of criticism; what happens now is that the focus of their strategies changes. Before they were intent on maintaining the loyalty of the personnel of the prison service, by ignoring or suppressing any sources of theoretical innovation which might have called into question the basis of punishment. After the cat was out of the bag their concerns were directed outward, toward maintaining the classical justice model against the threats to it, whether this meant conducting their own experiments to refute the recent criminological findings or making a few strategic withdrawals, to maintain the rest of the system.

The fact that the prison directors had to build a barrier against those pounding on the walls to get in shows that their earlier attempt to quash any incipient rebellion, before it had begun to arise, had failed. That they failed is not surprising, for to have succeeded, they would have had to ensure that none of their personnel were exposed to the alternative theories of criminality that were sweeping the Continent; even they could not dictate personal reading tastes and ensure that no tales of hardship reached the press or government. They succeeded in this by casting doubt upon unattributable stories (the defence as far back as the Kimberly Commission in 1878) or by accumulating power to themselves which worked until the advent of the civil servants. They were still able to capitalise on the scepticism of the public, which was partly a result of their own naturalisation strategies which presented the classical justice model as the only possible model of justice, and by aspersions to the calamitous results

that would ensue if criminological findings were allowed to direct sentencing. It was a sign that they did not have perfect faith in such a strategy, since some had already shaken off its influence to instigate the questioning in the first place, that they ordered a set of experiments by C.Goring to refute the findings of the criminologists; no longer was it being dismissed as a 'quack' science but one whose findings were capable of being proved or disproved. This tacit admission of the possible validity of criminology was confirmed by Goring's own results which were welcomed for their dismissal of the continental criminologists but attacked for admitting the possible influence of hereditariness upon criminal behaviour. If one directly invests knowledge with the endowment of power, then all the strategies for maintaining a cultural consensus will be passed over; not only those that are utilised to quell conflict before it is ever arises, which pertains to the era of deterrence, but also those which are used to help keep a protective barrier up to prevent the acceptance of ideas that are foreign to the current consensus.

The determination with which the prison commissioners and prison medical staff fought against criminology was exhibited by the vigorous campaign against eugenics which threatened criminal responsibility. The project to keep culpability at the heart of criminal justice was aided by 'the tendency of prison medical staff to narrow the definition of irresponsibility to traditional insanity and severe mental defectiveness and they were therefore distrustful of eugenicists or others who urged inherited predisposition as the major cause of behaviour'. This accent on how the environment could



shape pre-natal potential led them into open conflict with the sterilisation proposals of the eugenics movement and to stress their emphasis upon working on the 'normal human intellect'. Unlike the previous period, when ideas that deviated from the cultural consensus could be dismissed out of hand, the commissioners took the threats that these ideas represented very seriously and went to great lengths to refute them: 'the medical personnel of the Prison Commission were concerned in laborious attempts to define the exact nature of the various attempts to define the exact nature of the various insanities which they entirely accepted should exculpate the offender from punishment'. Criminology had questioned an aspect of the classical justice model which tended to assume a simple, rough and ready bifurcation of criminals into those who were responsible and the contrary. The response by the commissioners was to issue detailed experiments, whose findings clashed with that of the eugenics movement but they did concede some ground by 'widening the boundaries of mental treatment and diagnosis to include large numbers of people who were never considered to be either insane or certifiably mentally defective'.<sup>9</sup> Even though the purpose of the experiments by the government prison service, they unwittingly contributed to further ideational elaboration because of the challenge of eugenics.

I have written that Foucault puts a misplaced emphasis on power since he views it as an inevitable accompaniment to knowledge; this leads to an unwarranted assumptions about the coherence of any set of ideas so that he can never see where power does arise in a study of the politics of culture, namely shoring up any intellectual deficiencies through containment or if



these deficiencies are exposed, by a process of contention and rebuttal such as the above. For all the talk concerning power, its true role is concealed by the power/knowledge school.

A vacuum abhorred:

The Gladstone Committee had given rise to extensive rearrangements throughout the prison service as a result of its vague calls for reform and individual treatment without specifying exactly what was being called for. Thus these calls were filled out by people who had their own idea of what was meant by the committee. The prison commission was faced with problems in the structural sphere as they attempted to set up establishments that would cater for the variety of demands that were now being pressed upon them and yet still tried to maintain a dominant say. This was undermined by the afore-mentioned extent of cultural variation as many possessed their own ideas as to how far the introduction of reformatory policies should proceed. They tugged on the lead that had been given to them and turned on the prison commissioners when they believed that reforms were not being implemented according to their own pace or plans. It was not just reform groups that had weighed in with their views about future developments, groups which had sensed that the current of opinion had begun to flow in their direction and wished to effect a more rapid change, but also groups which stood to defend their own conception of the status quo such as the prison officers or judiciary.

What should be stressed is that this represents a transitional period in the development of the penal structure. Due to its inability to serve a multiplicity of demands it had shifted from a tightly unified, centralised system to one which was trying to admit much more diversification whilst the political elite still had the last say in all important matters. It might seem that I am suggesting that the period after 1895 represented a complete switch to a decentralised system comprised of autonomous units, but this is not so. What I am saying that this period represented a time when much was up for grabs but since the government could increase its resources to a far greater extent than other bodies could, it is just as likely that it could re-impose control. I doubt whether its control could be classified as complete since there was the above structural tension between centralisation and specialisation, itself partly deriving from the necessary incompatibility of reform and deterrence.

The government did not stand in the same kind of relationship to them all nor were all of these bodies possessed of the same ideals or resources so that there was a different outcome in practically every case. It is difficult to draw many conclusions from the variety of these results except a negative one which casts doubt upon the social control thesis. Whatever its sophistication, this thesis depends upon on all outcomes of the reform debate serving the maintenance of a particular distribution of wealth and power in the wider society. Unless this thesis is to descend into a series of ad hoc hypotheses which claim that every outcome favours the existing elites but which refuses to formulate in advance what might serve as

favourable evidence, then the conflicting nature of individual results, considered collectively, must call into question the social control thesis. It is highly unlikely that the series of advances and retreats that characterised the prison service after 1895 can be encapsulated within the boundaries of the social control thesis: the failure of the preventive detention camps and inebriate reformatories, the difficulty in persuading the judges to dispense with proportionate judgements to give reformatory training time to work, the reluctance and recalcitrance of the aid societies and missionary workers to adopt themselves to the dictates of the central government; on the other hand there was some success with the Borstal camps and reformatory schools and a slow development of a professional probation service.

This mixed bag of results weakens the possibility of identifying the outlook and shape of the prison service with any one body, even one as powerful as the central government. Power cannot be estimated apart from the relation and context in which any particular person or group stands; what made the central government strong previously was that it occupied a dominant position within a unified prison service but the structural relationship began to change after 1895. Within this structural framework, it was possible to see penal policies as the result of one group but the transition toward a less unified system comprised of more autonomous units made it impossible for central government to put its own stamp upon policy, at least not without smudging by the actions of others.



The necessity to take into account structural influences has been one of the points of this last section: I have tried to draw attention to structural influences that may impede or boost the development of ideas and beliefs by making the price of this development unattainable so that elaboration would have to await a more favourable moment. The best example of this was how slowly the reduction in the disparities in sentencing and punishment came about despite the validity of the necessary complementarity having been acknowledged for a long time before.

One of the great bulwarks of the social control thesis has been a denial of pluralism or if it is admitted, it has been dismissed as irrelevant to the outcome. What the foregoing account has demonstrated is not that the necessary conditions which the social control thesis postulates are never apparent (this was what the second period demonstrated), but that they depend on highly specific circumstances that are themselves dependent on strategies of containment and concealment. There is nothing irrevocable about them for their downfall can be internally derived; that is to say that the policies of deterrence came apart because (i) their very success meant that more attention was focused on the cases that could not be solved according to general policies, and (ii) centralisation (to ensure that deliberately weighted policies were implemented) brought in a group which did not share the same perspective on punishment. There was no group which suddenly discovered its operations were being frustrated by penal policies so we had to look for reasons contained within the penal practices for clues as to how it failed. Hence the conditions of the social control

thesis may be disrupted, even without the advent of a group which realises that the prevailing consensus is obstructing them or preventing them from accomplishing something they desire.

When the cover is blown on cultural containment and concealment, this does not necessarily mean that the game is up; the presentation of alternatives makes the task of maintaining some kind of consensus much more difficult than when there was not such a profusion of choice. The tactics used to prop up some semblance of consensus are a lot more overt and the chances of success have lessened. The power/knowledge school gets off on the wrong foot straightaway because by binding power and knowledge together, the use of cultural power to maintain socio-cultural quietude in the face of ideational variety will never arise. This is because there are extreme assumptions made about the coherence of the prevailing consensus so that no defects or lacunae can be detected within it. Even Kuhn, who was wont to portray scientific development as the rise and fall of a dense network of interconnected ideas, admitted that these complementarities do not have the answer to everything and thus the practitioners tend to shunt the unanswerable problems aside until there is a day of reckoning on which they must be faced.

It is difficult to tell which comes first and which influences which: the conception of power as always connected to ideas and so subordinating them to practical exigencies or one set of ideas as definitive of or dominant within any one period but the end result is equally unpalatable. We end up with few clues as to how ideas attained the position they did, how they

were maintained in their dominant position and finally how they were toppled from it. Not only are ideas treated in an idiosyncratic fashion but there is little attempt to connect up their advancement with structural developments and agency is reduced to the dumb implementation of these ideas with little creative input. If we take the simple step of admitting pluralism in both the ideational and social spheres, then any immediate link between power and knowledge will be cut. Pluralism precludes monism and animates agency since now they have something to fight for; it introduces intelligibility into the choices of agency as, having discarded ideational monism, we have to ask ourselves why this group chose this particular set of ideas as opposed to others that were conspicuously public; what is it about this set of ideas that matches up with the interests and outlook of this group. As there is ideational pluralism we have to ask ourselves why such pluralism arose, what is being served by it. Such variety can only mean that no idea holds out all the answers but has a more limited range so that some ideas exist to rectify the deficiencies of others and so introducing the notion of fractures and fissures at the ideational level.



## 8. Conclusion

This thesis has had two objectives: the first to question the methodology of revisionist histories of the prisons, namely the clasp together of power and knowledge. I did so because I was convinced that employing this method precluded certain events being featured in penal histories. All changes within the prisons and in forms of treatment and sentencing are seen as more efficient means of obtaining a goal, which was either never made very clear, or if it was, could never be held as a tenable thesis. The second was to develop an alternative approach which would suggest how the role of ideas should be appreciated, without them being *a priori* wedded to power.

There are obvious affinities between the power/knowledge formula and the more general 'dominant ideology' thesis which held sway twenty years ago, most notably that public perception is manipulated to bring about a state of affairs beneficial to a certain class. The objection I threw forward was that which was slung at the 'dominant ideology' thesis, namely does there actually exist only one coherent set of ideas which are endorsed by this ruling class? The key phrase is 'one coherent set of ideas' for this asks whether there is monism or pluralism at the ideational level and whether the idea(s) are themselves coherent or do they contain contradictory elements.

This was the greatest objection I levelled against both the progressive and revisionist schools of penal history, that they both see the course of

prison history as being dominated by one idea, reform, though both derive radically different conclusions from it. What I tried to show is that, from its first insertion into penal practice, the idea of punishment was riven by a contradiction: it contained prescriptions for treating the prisoners as a means to lower the crime rate, justifying practically any means by which this end could be secured and for treating them as an end-in-themselves, as the primary concern was to stir a recognition by the prisoner of the wrong he had done. As this recognition had to be voluntary, punishment could not be so coercive as to cause harm to the very faculties through which this recognition was to be achieved; if the prisoner's mental reasoning was impaired there was little prospect of him arriving at the desired conclusions.

This emphasis upon the contradictory elements within the idea of punishment helped me to understand much of the subsequent conduct and led me to endorse analytical dualism. This was based upon the conviction that ideas have a real but conditional influence upon social conduct and so adopted a method which would enable this influence to be understood. It is not enough to remain with vague blandishments that ideas have an influence; we had to move beyond this stage and specify what particular influence specific configurations of ideas have upon social life.

Analytical dualism which enjoins social theorists to examine the social influences (structural and cultural variables) apart from their interaction with social life. This method is liable to misunderstanding, so it should be stressed the separation is a methodological one, necessary to estimate the conditional influence they have upon agents. I am not suggesting that these



influences actually stand apart from social life. Another point which must be stringently maintained is that the influence of these variables is strictly conditional, since in the last instance agents are free to do anything they want, whatever the cost. What analytical dualism allows us to do is to estimate what is the least costly and troublesome thing to do: thus in the case of sentencing reform, I showed there was little point in the prison commissioners pursuing this point until they were in control of all the prisons themselves. There was a strong likelihood that any proposed reforms would be disregarded or ignored, like many other directives from the political centre so that any such efforts to reduce sentencing disparities would be wasted.

One of the central tenets of this study was to reject the type of analysis offered by the power/knowledge school since this represented a denigration of the influence of ideas. This was trumpeted as a virtue because it was claimed that this would let us see ideas as perennially entangled in a struggle for mastery between competing groups. This forbade any attempt to arrive at an estimate of the ideas' influence because it was impossible to tell if the agents were reacting to this influence or were they completely disregarding it. Only by pulling the two apart and examining both separately, could we arrive at a satisfactory estimation of the influence of ideas. I hope I have offered adequate proof throughout of the less than compelling story and implications that the power/knowledge school can offer and thus why it must be rejected. The alternative approach, that I offered, proclaims itself to be realist but is this not pejorative point-scoring-who would not want to be



a realist? Let me say a few words about realism as a methodological tenet and how it distinguishes itself from the power/knowledge approach.

Realism refined:

Realism as a thesis about the social world entails that society is made up of more than the sum of individuals within it and that this extra something is the influence of frameworks of action which are irreducible to individuals. This is not to say that these frameworks stand apart from individuals but possess properties of their own. As these properties possess causal influence, some method must be adopted which will enable them to be scrutinised. Hence my advocacy of analytical dualism which does this.

To those versed in the debates of social theory, it will be obvious that the inspiration for a realist approach derives from the works of Roy Bhaskar, who labelled his approach variously as *transcendental* or *critical realism*. This was to distinguish it from both empirical realism which confounded events with the mechanisms generating them, or, in our terminology, actions with the frameworks which facilitated them; and also from transcendental idealism which would invoke the notion of a framework as a heuristic device but deny that we could ever affirm its existence or say that it possessed causal powers. The second of these options is the one most often taken by social theorists who may be suspicious of any notions that would undercut the autonomy of human agency. The real battle is between those who affirm the real and irreducible existence of such structures as the prison service and those who simply believe it is a

convenient shorthand device for all the people within it. It is then incumbent upon me to clarify why the conditions of action must be accorded a real presence.

The hint in the last sentence concerning conditions of action is an aid. This implies that such conditions can neither be depicted as a constraint or enablement prior to knowing the location of social actors but may be either, depending upon where the actors are placed within society. The frameworks of action do not simply hinder action (they may do this depending upon the course of action) but make it possible in the first place. Unless this is conceded it would have to be said that all action begins *ab initio*. A realism of the social sciences would want to say that 'conscious human activity, consists of work on given [Bhaskar's italics] objects, and cannot be conceived as taking place in their absence' and, importantly for this thesis, 'these objects may be either material or *ideational*[my italics]'.<sup>1</sup> This is to say that people may try to effect change upon an institution, such as making local prisons more accountable to central government, or changing the law in the light of some previously unheeded connection or innovation. This conviction, that human activity often consists of the transformation or preservation of the frameworks of action which are construed as given, carries a number of important notions within an apparently innocuous assumption. That these frameworks are given implies that they pre-date current action and so are irreducible to them. If this is not conceded, then it is difficult to ascertain what might influence action, apart from that of the personal realm. But once we admit that these frameworks exist, prior to the



actions of any agents whose conduct is being scrutinised, then we must accept that these frameworks, by virtue of their influence, possess irreducible properties that can be ascribed only to them.

To elucidate his idea of human agency, Bhaskar supplies us with the model of the 'sculptor at work, fashioning a product out of the material and with the tools available to him or her... [this model] applies to discursive as well as to non-discursive practices; to science and politics, as much as to economics. Thus in science the raw materials used in the construction of new theories are established results, half-forgotten ideas, the stock of available paradigms and models, methods and techniques of inquiry'.<sup>2</sup> I wish to emphasise that Bhaskar's transformational model of social activity (as he calls it) applies equally well to the development of ideas and knowledge as it does to the elaboration of particular structures. I would also wish to amend the image of the sculptor slightly to bring out certain aspects of social reality that might otherwise be ignored.

The possibility of successfully achieving the desired result depends upon two things: the quality of the material with which one is working and the tools that are available to oneself. If the material is granite-like and one only has a feeble pick then it is unlikely that a rapid transformation will be forthcoming. Translating this into a more sociological idiom, not all social structures or ideational systems are equally susceptible to transformation and such change is partly dependent upon the resources that the respective agents can summon to the task. Thus in the example of central government trying to wrest control away from the local prisons, the political elite could



be far more direct than when it was dealing with the judiciary which, while however incompatible its sentencing policies were with an efficient prison service, was essential to their operation. Such a relationship between institutions is itself emergent, i.e. it only arises when the two are considered relationally and not separately and is the material or situational logic with which agents must contend.

The question of the distribution of resources has not gone unanswered in either political science or sociology but the former point, which addressed the properties of the various frameworks of action, has not been adequately attended to. In this thesis, I have dwelt on the logical properties possessed by ideas and the difficulties that contradiction between ideas places in the way of agents' activities. This is not an impenetrable barrier but an obstacle which, if people are determined on a particular course of action, must be circumvented, all of which costs greater time and effort than if another route had been taken. Likewise structural frameworks bring about distributed costs and benefits so there are winners and losers as the result of structural conditioning. This, in turn, will influence agents' efforts to transform or retain the current social structure. Whilst I am upholding the position that structural conditioning brings into being a vested interest in change or stability and that such interests are not merely the result of agents' perception of their situation, this does not imply that agents are bound to defend or act upon these interests.

The actions of the prison officers represented the best example of the conditional effects of a social structure: there was no doubt that the effects

of reform were deleterious to their position but not all officers rushed to defend their interests. This is not to say that those who did not take militant action, did not care about their worsening situation but were hampered by the culture of ready obedience and deference to those in authority and, following the dismissal of those who had gone on strike, believed that the costs of opposing the government were greater than the effects of reform. Thus we see that structural influence is mediated by agents and that even those occupying the same position are not predisposed to pursue identical courses of action. Of course, the miscalculation by the prison officers who had taken industrial action reinforced the belief of the other prison officers that they were caught between the devil and the deep blue sea and that they would simply have to accept their lot.

This is what is missing in many social control accounts, for no attention is paid to how a particular cultural or structural framework may predispose agents to accept or oppose change. It must be reiterated that this conditioning is itself emergent - it arises from the link between the present situation and the proposed changes. Thus prior to 1895, penal practices had been geared toward deterrence but the proposed policies of reform were antithetical to deterrence. Only by examining the interplay between the two can we understand why the prison officers feared for their positions. The strain between the incompatible operations of reform and deterrence (a systemic incompatibility) was replicated at the level of agency, in the guise of frustration over the impossibility of ever reconciling the two and through the consequent disruption of reform or deterrence as the one always



impeded the other. Since both were believed to be necessary for successful penal practices, a compromise was the most inviting solution. There is an obvious affinity between the situational logic of structural and cultural frameworks here but I would want to stress that the two cannot be collapsed into each other. Can I provide any reasons why there should not be such a conflation?

One of the most obvious reasons for collapsing structure into culture is the purported concept-dependence of social structures - unlike natural reality, the components of social reality do not exist apart from the conceptions that people have of them. It is too large a step from admitting that social structures are dependent upon some concepts, to conceding that they are simply these ideas. If this was the case we would be at a loss to explain why the structure of the prison service was able to endure despite their being extensive and protracted disagreement about the very nature of the prison. Equally we cannot brush culture under the rug of structure for the inception of the prison did not call into being one determinate set of ideas but rather provoked great disagreement about its exact role. There may be those who would concur in granting social structures a real presence but would be queasy at according the same status to ideas; this is because of the oft-noted capacity of ideas to be interpreted in various ways. This pluralism seems to undercut any objective conception of knowledge as there may be no determinate agreement on an idea might mean. I have demonstrated, throughout this thesis, that those who upheld either reform or deterrence often did not grasp the total implications of either idea or were



divided among themselves as to what each concept might entail but this did nothing to lessen the contradiction between the ideas. Nor am I committed to the position that there is an unvarying idea of, say, deterrence for as we have seen it began to undergo radical changes in the twentieth century.

The resolute sceptic may still harbour doubts about the realist nature of both structure and culture or alternatively may believe that one or the other has greater primacy. Whilst I would not want to deny that structural or cultural influences may play a dominant part in a particular study, as I believe that ideas often did throughout the history of the prisons within Britain, this cannot be advanced as a general methodological position. There may be some who would wish to say that a structural influence, such as the crime rate, ultimately plays a determining role even though this influence must be mediated through ideas otherwise this influence would never come to fruition. Though it is impossible to estimate the exact weight of influence of either structure or culture- for how could we find a common denominator for the influence of both since we would have to know the answers to various counter-factual questions- this does not mean that either influence could be reduced to an epiphenomenon of the other. If anyone wishes to advance such a proposition, it is incumbent upon them to explain why this particular structural or cultural outcome occurred.

It is insufficient to shelter behind the notion of an obvious affinity between a structural cause and a cultural result for there was no obvious reaction to a rising crime rate or an evident structural rearrangement of the prison service as a result of calls for more reform. Several outcomes were

equally possible and for those who wish to maintain a one-way structural or cultural determinism, the burden of proof lies upon them to explain why a particular outcome occurred.

### The flow of history:

One of the strongest reasons why these frameworks of action were not accorded a real existence was that they are not immediately apparent above and beyond the activities of agents. This is even more the case when we view past events historically, i.e. as a continuous unfolding narrative carried out by agents, and do not break them up to ask how are such actions were possible. When we do this we realise that human action would impossible if the existence of such frameworks were not conceded and so recognise a causal criterion of reality. The rejoinder from those who are unwilling to grant such frameworks an autonomous existence would be that while they may possess causal efficacy they do so only in virtue of the individuals through which they act. Realists would accept this but state that this is insufficient to undercut the existence of these frameworks because there still exist properties which are irreducible to any individuals or groups. Thus the ideas of reform and deterrence only had influence when taken up by active agents but these ideas should not be conflated with the subjective mental states entertained by the individuals concerned - this was what I called the confusion between the psychological and logical. For instance, some people might try to implement both ideas simultaneously, without recognising the contradiction of the two ideas together; this was the case when the



government first began to establish convict prisons. The fact that people were not aware of the contradiction did nothing to lessen its force. Accepting this pre-existence and autonomy of the frameworks of action entails that we go along with Bhaskar and recognise that 'in every process of productive activity a material as well as an efficient cause is necessary'.<sup>3</sup> Agency is the efficient cause but it must deal with a pre-existent framework which is the material cause.

The power/knowledge approach has consistently refused to grant that there may be such material causes in social life and hence it has not seen any need to take them into account, nor develop a methodology which would allow us to assess their influence. The implicit assumption of the power/knowledge school is that agents and groups are free to devise their machinations un beholden to the past and unconstrained by either material or ideal factors. What I have tried to show is the role of penal administrators carried with it certain duties which, however inimical to the individuals concerned, had to be observed. This means that we should not view history as a continual ceaseless flow but rather a series of stops and starts as people fill the positions and roles bequeathed to them by the past and grapple with their influence.

#### Influence assessed:

By breaking up history so that we can see the influence of both structure and culture and by outlining the situational logic allows us to understand events that would otherwise remain obscure or susceptible to ad



hoc explanations. For second period in which deterrence was heavily enforced and emphasised, the explanations given for it being a period of repression are usually given in terms of the authoritarian or military personality of the Director of Convict Prisons, but if his conduct is examined in the light of the necessary contradiction, it can be seen as an intelligible attempt to accentuate only one element at the expense of another and to ensure that such undue emphasis would go unnoticed and continue.

Having first examined the situational logic, we can pass to studying the means by which this influence can be discounted. One of the virtues of this approach is that it permits us to see how a consensus may be maintained and actively striven for, rather than viewing it as the result of a great clamour which then subsides. The consensus continues as a result of inertia until the next great uproar for a different set of principles marks the introduction of a different set of principles. This is the equivalent of the 'great wave' theory of ideas which sees their realisation as inevitable as the tide coming but offers a paltry explanation as to why this should be so, because it is ungrounded in human agency. This was where the notion of power came in, as it could be deployed to conceal the undue emphasis given to one idea rather than another or to defend a particular consensus that may be under attack from several novel alternatives. I faulted the power/knowledge school for having missed this, for all their talk of reconnecting power with the study of the advancement of ideas. Hence the active intervention of agents is the link between the rise and fall of ideas

and their favouring of one idea over another can be responsible for the eventual introduction of the idea that they abhorred (cf. 1865-95).

Both schools of history alluded to above could be faulted for their lack of reference to human agency: the Whig version which saw prison reforms as being the inevitable accompaniment of the innate decency and beneficence of the elites and so were unquestioningly adopted and implemented; and the Foucauldian inspired school which viewed reforms as a most effective means of ensuring social control and again were adopted without a hint of divisiveness amidst the ruling class and were administered without hitches to the dumb lot that comprised the prisoners. There is no indication in either account that punishment might have been a field of contention, that some might have thought that the prisoners were being shamefully pampered or that others might have thought they were being callously treated; nor that such divided opinions might have found their way into actual policies of punishment and that a particular opinion might have been elevated far above its counterpart, thanks to the machinations of its supporters.

The existence of such divided opinions did find their way into the very notion of punishment so that many found it impossible to conceptualise it without bringing to mind these two contradictory ideas. It was left to the inspectorate and commissioners to find some way of reconciling them. It is pluralism that is the wellspring of innovation and which proscribes any attempt to view penal history as the inevitable rise of one idea or another. The power/ knowledge formula is ill-equipped to deal with this phenomenon



since its assertion of any such necessary connection between power and ideas leads it to mistake the history of ideas as comprising only one particular ideational configuration out of a possible four.

One of the main thrusts of this thesis was to criticise the power/knowledge through an examination of one of the sites the scouring of which, it is claimed, justifies the promulgation of their favoured thesis. I have concentrated upon what might be called cultural variables to attack any notion of a necessary connection between ideas and power but in Chapter 7 I emphasised that structural influences must be accounted for by any viable theory of penal change. Mass structural trends such as democratisation are held to be pivotal but often inter-institutional influences are ignored. Such relationships like that between the prisons and judiciary are often given scant reference in penal histories but their relationship and the exact nature of it must figure in any adequate explanation. Their operations were obviously connected since the prisons existed to carry out the sentences passed by the judiciary and the prisons were highly dependent on the judiciary, as it was them who controlled the number of people who would be sent to prison. Since the two were so linked, they obviously had to find some form of accommodation so that each of their operations was not greatly obstructed. This meant that neither institution would get its own way. It should be noted that the 'when and the how', of such a relationship coming about is a highly contingent affair, dependent upon many empirical factors, such as their being a dominant part of the prison system that could set the agenda for the rest of the prison service. It is not a constant



relationship perduring through time and the delicate balance that characterises this relationship may be upset by novel factors, such as the switch to a decentralised regime, for whatever reason.

The effect of a structural relationship may have a great influence upon the genesis and transformation of ideas pertaining to punishment and it was Foucault's inability to allow this kind of explanatory variable in his account that was one more nail in its coffin. While I would concur with the revisionist attempt to draw some kind of connection between the rise of reformatory ideas and structural events such as the temporary cessation of transportation and its beneficial effects and a rising crime rate, where they go awry is an inability to explain why reforms were proposed as a solution to a perceived problem of social control. As I said before there is no obvious or logical connection between structural events and the rise to prominence of certain ideas which could trace the latter as an entailment of the former. I partially avoided this problem by noting that the rise of reform did not totally dislodge the notion of deterrence but also by tracing the genesis of ideas of reform and its connection to ideas of equity which were promoted by Whig radicals. Thus the ideas of reform can not be seen as a response to a short-term problem but were, in part, devised as a remedy to some long-standing cultural problems, ones of legitimacy, fairness and justice. Since their genesis pre-dated many of the structural problems with which they were supposed to deal then they cannot wholly be seen as a response to the problems of escalating crime among the working class.

Again the two histories, Whig and revisionist, mirror each other's defects: the Whig version sees the reorganisation of the prison service and the assumption of greater control by the government as inevitable once the need for reform was recognised and so culture dominates structure; the revisionist sees the introduction of reforms as a clever ploy by the ruling elites to deal with crime rates in a more insidious way and so structure dictates the ideas that will be taken up, though it is a general structural trend which predominates and not the particular structures of institutional systems. Obviously the way out of this dilemma is to find some method which allows us to link structure and culture without permitting either to dominate and which lets agency intercede without being domineering toward structure and culture. I believe that the method elaborated above allows to gauge the options that the structural and cultural variables present to agency by deriving the situational logic of each from their respective configurations.

I have tried to explain, though it demands a thesis in itself to explain adequately, why the call of uniting power and knowledge has proven so seductive to so many, so much so that it is a commonplace to open a book, whether it be a work of theory or an ethnographic study, and find it prefaced by the assertion that knowledge is power. This has sprung from the laudable recognition that ideas can be incorporated within ideologies and so serve as a means of domination. Yet contrary to the tenets of the power/knowledge school (for the recognition that a corpus of knowledge is detrimental to one's interests is itself a knowledge-item and so should lead

directly to the exercise of power) this realisation does nothing to alleviate the restrictions imposed. Even if it is not recognised that this admission of the unjust nature of the current consensus calls into question the power/knowledge formula, it cannot allow for the very emancipation which people sought and which drove them to adopt the power/knowledge formula in the first place. The best that one can do is replicate Foucault's vain and vague calls for resistance. Even if his theory did not offer such a meagre return in terms of historical analyses, its futility as an instrument to combat injustice or repression should cause many to discard and search for a method which can obtain a better understanding of how ideas may rise, despite the manifest costs it imposes on some.



## Notes

### Notes to Introduction

1. See Wiener (1987). He writes that the 'authors pass over the wider instrumental and symbolic roles of criminal policy which would take them into deeper waters of politics, social relations and culture', p.85-6.
2. Ignatieff (1983: 75)
3. *ibid*, p.77
4. *ibid*,
5. Garland (1985:170)
6. W.J. Forsythe (1990:239)

### Notes to Chapter 1

1. Foucault (1979: 80-81)
2. Garland (1990:145)
3. M.Foucault, PK, 1980, p.40
4. M.Foucault, DP, 1991, p.278
5. M.Foucault, Power/Knowledge, p.42
6. M.Foucault (1979:279)
7. *ibid*, p.281-82
8. Bottomley discards the term penal system for it suggests a degree of connectedness that is not apparent and uses the term penal process instead. Differentiation in the penal sphere is due to 'the different values of the penal agents [cultural differences] and operational [structural], in that each part of the process can be seen as having its own particular function',

p.219. A.K.Bottomley, *Decisions in the Penal Process*, Martin Robertson, London, 1973

9. Garland (1985:249)

10. *ibid*, p.247,

11. *ibid*, p.239

12. *ibid*, p.237,

13. *ibid*, p.241

14. Rutherford (1988), p.140

15. Garland (1985:161)

16. E.du Cane, *Punishment and Prevention of Crime*, Macmillian, London, 1885,

p.156

17. Garland (1985:171)

18. *ibid*, p.196

19. *ibid*, p.175

20. Bailey, (1987:30)

21. Garland (1985:187)

22. *ibid*, p.185

23. *ibid*, p.225

24. G.Rose, (1958:53-65,63)

24. Garland (1990), p.129

25. *ibid*, p.138-39

26. *cf.* DP, p.27

27. DP, p.239. It is a travesty of history to state that both the separate and silent systems were bound up with a project of attempting to confine every stage of the prisoners life within some kind of hierarchy. Such an interpretation fails to explain why there was so much agonising over whether the prisoners' recognition of his wrong-doing and his renunciation of any further criminal deeds was actually genuine or not. The penal administrators could never be sure whether behaviour displayed inside the prison could be successfully replicated outside it, hence the attempts of people like Maconochie to stimulate the prisoner by offering him a set quota of work to be completed and once it was the prisoner could be set free.

Since all this had to take place in some sort of framework established by the penal authorities Foucault could claim that the differences between the various models were negligible and all were an example of assujettissement. The loss is that we lose any notion of historical specificity in 'the night in which all cows are black' and are unable to draw any distinctions between changes in penal discipline.

28. Interestingly the one place where Foucault attempts to detail the mechanism through which moralisation of the lower classes was attempted, he concedes that there was resistance. The insertion of the fait divers in newspapers recounting the deeds of criminals was an 'attempt to impose a highly specific grid on the common perception of delinquents: to present them as close by, everywhere present and everywhere to be feared' but 'it certainly cannot be said that this tactic triumphed or that it brought about a



total break between the delinquents and the lower classes'. Socialist newspapers would try to expose the class-bias of the justice system and the exploitative efforts of capitalists; see DP, p. 285-92.

28.N. Mouzelis, *Sociological Theory: what went wrong? Diagnoses and Remedies* Routledge, London, 1995, p.48

29. Ignatieff, (1983:95)

30. See McWilliams (1983), (1985).

31. S.Clegg, *Frameworks of Power*, London, Sage Publications, 1989

32. Ignatieff (1983:94)

33. Foucault (1979:271)

34. Garland, who subscribes to Foucault's general approach, answers that in the case of Britain Foucault got his dates wrong and the changes that he envisaged did not occur until after the turn of this century. I do not believe that transposing the schema onto a later date solves the problems I have with the actual method since it skates over the problem of combining reform with deterrence.

35. Garland, BJS, (1990:3)

36. See DP, p.194, 'power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production'. Note the allusion to power being able to produce truth; it is clear that logical properties are subordinated to workings at the social level.

37. Garland (1990:162)

38. Foucault (1979:243)

39. Foucault (1980:42)

40. Ignatieff (1983:86)

41. Garland (1990:174)

## Notes to Chapter 2

1.D. Porpora (1989: 200)

2. M.S.Archer (1995:216)

3. Forsythe (1987:4)

4. A.von Hirsch (1993:13)

5. M. De Lacy, (1986:103)

6. *ibid*, p.104

7. *ibid*

8. Lacey (1988:29)

9. Thomas (1972:117)

10. Lacey (1988:33)

11. Hudson (1987:3)

12. Lacey (1988:31)

13. The literature on the concept of power is vast. Wrong (1979) and Morris (1988) are good representative discussions of some of the associated problems; where I would differ from the above two authors is that they would define power as 'the capacity of some persons to produce intended and foreseen effects on others' (Wrong, p.2). Although this definition has the advantage of differentiating 'power' from 'influence', it ends up equating ability with power yet from ordinary usage we can see that we use the concept of power when we produce intended effects which are unwanted or

resisted by others. As Barry (1991) says in a review article of Morriss (1988), 'there is more to (social) power than being able to do what you chose to do. Your having power entails that you have the ability to overcome resistance or opposition and by this means achieve an outcome different from the one that would have occurred in the absence of your intervention' (p.308); a related problem due to the omission of any reference to 'resistance' is that we treat 'the ability to get something you want if there is nobody stopping as a form of social power' which, from the standpoint of ordinary usage, does seem anomalous. Furthermore if we equate power with getting what you want then we end up eliding power with success; the problem, then, is that we do not distinguish between those who have actively striven to establish a certain set of arrangements and those who welcome these arrangements as they passively benefit from it.

If we accept that the concept of resistance is essential to our understanding of social power, we must note that persuasion, if it is a form of power (and I admit to being undecided about this; Beetham (1991: 44) is unwilling to classify persuasion as a form of power since one is free to refuse), is highly different from other forms such as force or manipulation as it leaves room for those on whom it is being exercised to accept or reject it. Other manifestations of power are usually exercised regardless of the wishes or wants of the people concerned.

14. Wrong (1979:27)

15. *ibid*, p.73



16. Etzioni (1968), p.361. See Wrong (1979: 73) where he cites Etzioni on this point. Interestingly, Etzioni classifies prisons as being the archetype of organisations where 'elites rely heavily on force to control their lower participants' so creating 'highly alienated lower participants' (1968: 361)

17. T.Kuhn, (1962:5)

### **Notes to Chapter 3**

1. Ignatieff, (1979:20)

2. *ibid*, p.72-3

3. Quoted in McConville (1981:108)

4. Sir George Paul, quoted in McConville, p.100

5. Holford Committee, PP 1810-11, p.588

6. *ibid*, p. 581-82

7. *ibid*, p.583

8. McConville (1981:140)

9. Memorials of Millbank, p.45

10. quoted in McConville, (1981:145)

11. Griffiths (1875:66)

12. *ibid*, p.203

13. Webbs (1963:75)

14. Crawford, Report on U.S. Penitentiaries, p. 12

15. *ibid*, p.19

16. Select Committee of the House of Lords on Gaols and Houses of Correction in England and Wales, 1st Report, PP, 1835, vol.11, p iv, recommendation 4

17. Third Report of Inspectors of Great Britain, PP, 1837-38, vol. 30, p. 3, p. 27
18. Report of Crawford, p. 13
19. Laurie (1846:40)
20. Laurie (1848:24)
21. Nihill (1839:76)
22. McConville, (1981:168)
23. Chesterton (1856:50)
24. *ibid*, pp. 17-18
25. *ibid*, p. 23
26. Grey Committee, Q 5113
27. *ibid*, Q 5132
28. *ibid*, recommendation 14
29. Q 6051
30. Jebb, RDMCP, 1852-53, LI, p. 46
31. cf. RDMCP, vol. 25, p. 610
32. Maconochie (1856), letter III
33. *ibid*
34. Maconochie (1846:46)
35. Maconochie (1850:9)
36. Dixon (1850:12)
37. Buxton (1818:7)
38. G. Postema (1986:266)
39. Works of Bentham, ed. Bowring, vol. 3, p. 206, quoted in Postema (1986:2720)
40. from Rationale of Judicial Evidence, quoted in Hostettler,

41. First Report from His Majesty's Commissioners on Criminal Law, P.P 1834, vol.26, p. 152
42. Second Report, P.P. 1836, vol.36, p.211
43. *ibid*, p.211-12
44. *ibid*, p.205
45. Fourth Report, P.P. 1839, vol 19. p.251
46. quoted in Radzinowicz and Hood, p. 735
47. 'On Law' in Economy and Society, Vol.2, Chp.8, p.891
48. *ibid*, p.787-8
49. *ibid*, p.886
50. a remark by one of the judges who had been asked to comment on the operation of codification; cf. Baron Alderson, P.P 1854, vol 53, p.398
51. RDMCP, 1856, PP, vol.14, p250
52. *ibid*, p. 251
53. PRO, HO, 12/4/362, 28 July 1853, quoted in Bartrip (1981:154)
54. Hansard, vol. 138, col 1535 (7th June 1855). Jebb was well aware that if one unfortunate wretch appeared at the bar of justice, a sweeping condemnation fell upon them all. The result would be that all remitted prisoners would experience great difficulty in gaining employment, due to increased suspicion and so reconvictions would rise; cf. RDMCP, 1862, vol.25, p.14
55. Bartrip, p.164
56. The Times, 30 Dec. 1862
57. Hansard, vol. 169, cols. 476



58.Forsythe (1987:153)

59. SC of the House of Lords..... Gaols and Houses of Correction, PP,1863,  
vol.IX, p.111

60. *ibid.* p.125

61. *ibid.* p.iii-iv

62. H.Tomlinson, p. 60-71, p.71

#### Notes to Chapter 4

1. RH, p.568

2. E.F. Du Cane, 'An Account of the Manner in which Sentences of Penal Servitude are carried out in England', in E.Pears (ed.), *Prisons and Reformatories at Home and Abroad* (1872), p.287

3. Du Cane (1885:2)

4. A. Griffiths, *Fifty Years of Public Service*, 1904, p,174-5

5. quoted in RH, p.540

6. see RH,p. 542

7. Griffiths, p.163

8. RH, p.558

9.Report of the Commissioners on the Treatment of the Treason-Felony Convicts in the English Convict Prisons, Parl. Papers,1867,vol.35, p.676

10. *ibid*, p.680

11. Isaac Butt, quoted in T.W.Moody, *Davitt and Irish Revolution 1846-82*, Clarendon Press, Oxford,1981,p.121

12. Things not generally known concerning England's treatment of Political prisoners, Dublin, 1869

13. O' Donovan Rossa, Irish Rebels in English Prisons, Brandon, Dingle. 1991, p.262

14. Report of the Commissioners Appointed to Inquire into the treatment of Treason-Felony Convicts in English Prisons, 1871, Parl. Papers, vol.32, p.28

15. H.O. 45 / 9624 A19541

16. Kimberly Commission, PP, 1878-79, vol 37, Q 531-32

17. *ibid*, p. lxi

18. 3 Hansard, CLXXV, col.2046; 20 June 1864

19. McConville, Vol II, p.195

20. Randolph Churchill, 3 Hansard, CLLIV, col. 1245, 16 Aug. 1880

21. McConville (1995:236)

22. They spoke of 'encouraging such a mode of managing prisons as may diminish, as far as possible, the necessity for resorting to punishment, especially of the severer kind', RCP, PP, 1878-79, XXXIV, 1, 16

23. McConville (1995:268)

24. *ibid*, p.273

25. William Tallack, The Times, 7 Jan 1880

26. McConville (1995:492, 495)

27. *ibid*, p. 391

28. *ibid*

29. PRO HO 45/ 9699/ A50087

30. PRO HO 45/18749/ 565861

31. RH, p.757

32. Harding (1988:604)

33. PRO HO 45/9707/A50752/3

34. PRO HO 144/211/A48493/2

35. L.O.Pike, *A History of Crime in England* (1876), quoted in RH, p.115

36. Gladstone Committee, PP 1895, vol. 56, p.1

### Notes to Chapter 5

1. G.Combe, quoted in W.Forsythe (1987:178)

2. Gina Lombroso, 1911

3. C. Lombroso, *Crime: its Causes and Remedies*, W. Heinemann, 1911, p.365

4. *L'Uomo delinquente*, fifth ed., Vol 1, p.59, quoted in Mannheim, *Pioneers in Criminology*, New Jersey, 1972

5. *ibid*, Wolfgang, 'Cesare Lombroso', p.259

6. *ibid*, quoted in Wolfgang, p.262

7. *ibid*, 'Raffaele Garofalo', p. 325-26

8. Gina Lombrosa (1911), p.154

9. E.Ferri, *Criminal Sociology*, xix

10. R.Saieilles, *La individualisation de la peine*, p.62

11. *ibid*, p.167

12. D.Garland (1985:96-98)

13. *ibid*, p.99

14. Tarde (1968:225)

15. *ibid*, p.107



16. Havelock Ellis, *The Criminal*, London, 1895, p.46, p.48

17. *ibid*, p.257

### Notes to Chapter 6

1. RCPDCP for the Year Ending 31 March 1898, p.7

2. Westminster Gazette, quoted in McConville, p.722

3. Maudsley, 'Remarks on Crime and Criminals', *Journal of Mental Science*, 1888, vol.34, quoted in Garland, *BJC*, 1988, no.2, p.4, note 9

4. C.Goring, p.16,

5. *ibid* p.270

6. Goring, 1st edition, p.368, quoted in RH, p.23

7. E.Ruggles-Brise (1921:214,xiv)

8. C.Burt, *The Young Delinquent*, (1927), p.600

9. Parliamentary Debates, 4th series, vol. 189, col. 238

10. Ruggles-Brise, quoted in Forsythe (1990:87)

11. L.Zedner (1991:243)

12. Branthwaite, PP, vol.35, (1907), p.603, quoted in Zedner, p.260

13. V. Bailey (1987:22)

14. G.Rose (1967:9)

15. Report of Young Offenders Committee, PP, 1927, XII, p1006, quoted in Bailey (1987)

16. quoted in RH, p.278

17 H.B.Simpson, 'Crime and Punishment', *The Contemporary Review* (1896), vol 70, p. 103

18 Ruggles- Brise, quoted in RH, p.382

19 Gladstone, 'Prevention of Crime-II', *The Justice of the Peace* (1908), vol.72, p.278

20. Forsythe (1990:49)

21. PRI Com, 7/541, 283

22. HO 45/10570/175685/49

23. Bailey (1987:191)

24. Ruggles-Brise, 'Copy of a Report of the Chairmen of the Commissioners of Prisons upon the Treatment of Crime in the United States', 1899, PP, vol. 43, quoted in Bochel (1976:14)

25. HO 140 503/ 7

26. Gamon, quoted in Bochel (1976:38)

27. Hansard, 15th April 1914

28. CETS, quoted in Bochel (1976:72)

29. An amalgamation of the Howard Association and the Howard League for Penal Reform.

30. Forsythe (1990:220)

31. J.E.Thomas (1972:120)

32. Dept. Committee, 1903, p. VII

33. Prison Officers' Magazine, Jan. 1924 and Feb. 1915

34. Hobhouse and Brockway, *English Prisons To-day*, p.106

35. *ibid*, p.322

36. Forsythe (1990:73). It is not surprising that they disavowed participation in such schemes for they had stated that 'the fundamental principle of uniformity of treatment which is the basis of order and discipline in the Convict prisons': see HO 144/18869/196919/2

37. PRO HO 45/11543/357055/ 51

38. See Ruggles-Brise (1921:195)

39. HO 144/18869/196919/ 2, 19 Aug, 1910

40. Ashworth (1983:590

41. HO 144/18869/196919 /4

### **Notes to Chapter 7**

1. cf. Ignatieff (1979:73)

2. HO 42/6,quoted in Ignatieff (1979:920

3. *ibid*, p.130

4. *ibid*, p.154 Table 2, and more generally Chps. 6 & 7. There may be a temptation to view the crime rate as the total aggregate of offences but it is actually measured in relation to a certain population figure. This relational property itself exerts a causal power when considered together with the operations in the penal sphere, for an ever ascending crime rate makes it impossible for a system of punishment to function effectively without change. Such a causal power may go unexercised but this is if those in charge of the penal system respond to the situational logic and take immediate steps to rectify the situation. The situational logic here corresponds to the scenario of the competitive contradiction between ideas.

5. Ignatieff (1983:89)



6. M.S.Archer (1988:1940)

7. A.Paterson, quoted in Thomas, (1972:140)

8. See Thomas generally for a good discussion of these problems.

9. Forsythe, (1990:155-59)

### **Notes to Conclusion**

1. R.Bhaskar (1989:77-78)

2. *ibid*, p.78

3. *ibid*, p.78

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